United States Court of Appeals

for the Second Circuit

APPENDIX

77-7232

United States Court of Appeals
FOR THE SECOND CIRCUIT

HERBERT FEDERMAN et al.,
Plaintiffs,
against

EMPIRE FIRE AND MARINE INSURANCE COMPANY et al.,
Defendants-Appellees,
and

STUART C. GOLDBERG and JACOB ASCHKENASY,
Additional Defendants on Cross-Claims,

STUART C. GOLDBERG,
Additional Defendant on Cross-Claims, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
SEP 23 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

HERBERT FEDERMAN and DIETRICH MEYERHOFER, :

Plaintiffs, :

-against- :

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al., : 73 Civ. 1940 (L.F.M.)

Defendants, :

: NOTICE OF MOTION

-and- :

STUART C. GOLDBERG and JACOB ASCHKENASY, :

Additional Defendants on Cross-Claims. :

---x

S I R S :

PLEASE TAKE NOTICE that, pursuant to Rules 12(c) and 12(h)(2) of the Federal Rules of Civil Procedure, the undersigned will move this Court, at the United States Court House, Foley Square, New York, New York, Room 501, on March 19, 1976, at 2:15 P.M., for judgment on the pleadings dismissing the counterclaim asserted against them in the amended answer of additional defendant Stuart Charles Goldberg on the ground that the counterclaim fails to state a claim upon which relief can be granted, together with such other relief as the Court may deem proper.

PLEASE TAKE FURTHER NOTICE that opposing papers are

required to be served at least three (3) days prior to the return date of this motion.

Dated: New York, New York
March 8, 1976

Yours, etc.,

ARANOW, BRODSKY, BOHLINGER,
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United States District Court

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1940
(L.F.M.)

HERBERT FEDERMAN and DIETRICH MEYERHOFER,

Plaintiffs,

—against—

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants,

—and—

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims.

APPENDIX IN SUPPORT OF MOTION BY EMPIRE DEFENDANTS TO DISMISS GOLDBERG COUNTERCLAIM

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[Pages 1-12 of this exhibit are reproduced in the Appendix at pp. 67a-80a.]

[Pages 13-23 of this exhibit are reproduced in the Appendix at pp. 6a-15a.]

[Pages 24-37 of this exhibit are reproduced at pp. 16a-29a.]

[Pages 39-51 of this exhibit are reproduced in the Appendix at pp. 30a-42a.]

[Pages 52-65 of this exhibit are reproduced in the Appendix at pp. 43a-58a.]

[Pages 66-69 of this exhibit are reproduced in the Appendix at pp. 59a-60a and 65a-66a.]

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--x

HERBERT FEDERMAN, et ano.,
Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,
Defendants

-and-

STUART C. GOLDBERG and JACOB ASCHKENASY,
Additional Defendants of Cross-Claims

--x

DIETRICH MEYERHOFER and HERBERT FEDERMAN, etc.,
Plaintiffs,

73 Civ. 1940 L.F.M.

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,
Defendants.

--x

DEPOSITION of STUART C. GOLDBERG, taken before C. Lorraine Simon, a Notary Public of the State of New York, held at the offices of Hart & Hume, Esqs., 10 East 40th Street, New York, New York, on the 29th day of May, 1975 at 10:30 a.m., pursuant to Notice.

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the next page is 83

read to you is true?

A Yes.

Q Are you able to tell us that it is true in its entirety?

A I don't think the figures are right to the dollar. I can give you the amounts if you like.

Q My question is, is what I read to you true?

MR. BERGADANO: Except for the general damages which will be a matter of law fact which will be for the trier of facts to determine.

MR. TERSIGNI: I would like to have the witness's best testimony.

MR. BERGADANO: You have gotten counsel's statement as to that element of that paragraph of the amended answer.

MR. TERSIGNI: I would like the witness's testimony whether the allegation is true. I understand counsel's contention.

MR. BERGADANO: That is a matter of law, not just contention.

MR. TERSIGNI: I think I understand the law too, but right now I would like the witness's testimony.

A Well, the $15,000 figure for counsel fees, I have a more accurate figure for you and depending on the more accurate interpretation of a $10,000 in billable time in Mr. McKenna's firm, I think it would be accurate.

Q What about the other statements in that paragraph?

A Yes, they are accurate.

Q Are you able to tell us today under oath, Mr. Goldberg --

MR. JAROSLAWICZ: I object to counsel using the term "under oath."

The witness has been sworn and the repetition serves no purpose except to intimidate the witness. I request that it be deleted from future questions.

MR. TERSIGNI: I request you wait until I finish my question before you object.

Q Are you able to tell us today, Mr. Goldberg, under oath whether or not your reputation has been damaged in an amount not less than $850,000?

MR. JAROSLAWICZ: I object to the witness answering any questions containing the statement "under oath" in them.

MR. TERSIGNI: Do you direct him not to answer?

MR. JAROSLAWICZ: Any question containing the phrase "under oath." The witness has been sworn.

MR. BERGADANO: Again, I repeat, the amount of general damages is a question for the court and not a question for this witness to determine a precise dollar amount. This is not a claim where we have something damaged that has a dollar amount of repair cost.

MR. TERSIGNI: He has already testified he is able to tell me that it is true.

MR. BERGADANO: That is your interpretation of his answer.

MR. TERSIGNI: I ask for an answer to my question.

MR. JAROSLAWICZ: I object and I direct him not to answer in that form.

MR. TERSIGNI: You know the rules, Mr. Jaroslawicz. You can note your objection or you can go further and direct him not to answer.

MR. JAROSLAWICZ: That is what I did.

MR. TERSIGNI: I have been asking you to do that so we don't spend a lot of time --

MR. DAVIS: Can we go off the record?

(Discussion off the record.)

MR. JAROSLAWICZ: The firm of Julien & Schlesinger appears for Mr. Goldberg on his cross claims and counterclaim only. We are not representing Mr. Goldberg as a defendant in any action.

MR. DAVIS: I object to counsel appearing on this deposition in such an informal manner. It neither binds counsel nor his client and it certainly does not appear to have the endorsed consent of his former counsel, Hart & Hume.

MR. BERGADANO: We are still counsel; you are wrong there.

MR. DAVIS: I don't know how you can be counsel and have other counsel for another smallish part of your case.

MR. BERGADANO: The firm of Wormser, Kiely, et al., were the original counsel for Mr. Goldberg. We were retained as co-counsel, Hart & Hume as co-counsel, for Mr. Goldberg. Those two firms are co-counsel for Mr. Goldberg.

It is my understanding that there is a

stipulation either signed or being signed which will be submitted to Judge MacMahon for his signature whereby the firm of Julien, Schlesinger is to be substituted in place of Wormser, Kiely, Alessandroni & McCann.

MR. DAVIS: In that case I withdraw my objection.

MR. JAROSLAWICZ: We are being substituted for Wormser, Keily.

MR. DAVIS: I accepted that already. We don't have to repeat it. I withdraw the objection to the gentleman appearing today even in the absence of a formalized approval.

(Discussion off the record.)

MR. TERSIGNI: Let me state for the record before we resume that counsel have discussed off the record the suggestion which has been made that one counsel articulate objections on behalf of Mr. Goldberg. Apparently that is not agreeable to Mr. Goldberg's attorneys and I have suggested that the problem be noted on the record and that we continue, all parties reserving their rights to take any appropriate action they may deem advisable.

MR. JAROSLAWICZ: The reason for that is we have different interests representing Mr. Goldberg on his affirmative claims and Mr. Goldberg as a defendant.

MR. BERGADANO: And some of them may overlap.

MR. TERSIGNI: Before the colloquy I had asked a question which counsel, Mr. Jaroslawicz, I believe asked the witness not to answer. So I will go on.

Q Mr. Goldberg, are you able to testify that your reputation has been damaged in an amount not less than $850,000?

A Yes.

Q Do I understand from your answer that it has been damaged in an amount not less than that figure?

A Yes.

Q On what basis are you able to so testify, specifically with regard to the alleged damage not being less than $850,000?

A My reputation has been substantially destroyed by the actions of those against whom I am claiming.

Q Is that your answer?

A Yes.

Q My question is how are you able to testify that the damage in monetary terms is not less than $850,000?

MR. JAROSLAWICZ: I object to the form of that question.

MR. TERSIGNI: What is the objection?

MR. JAROSLAWICZ: "How are you able to testify." If you want to know the basis for his calculations, then ask him.

Q What is the basis for your testimony that the damage which you have referred to in monetary terms is not less than $850,000?

A The fact that I have been deprived of my reputation so that I cannot engage successfully in the private practice of law and that my livelihood in the future will depend upon my earnings as a professor of law where my income will be substantially less than it would be had these occurrences not taken place.

Q Are you finished with your answer?

A Yes.

Q What is the basis of the number $850,000 as opposed to any other number such as $850 or $850,000,000?

MR. JAROSLAWICZ: You want to know why he used the number $850,000?

MR. TERSIGNI: He didn't use it in the sense that he did not draft the pleading. But I am trying to find out from the witness what the basis of his testimony is in terms of the number, the basis of his calculation, if you prefer that phrase.

A At the time these occurrences took place I was thirty-one years of age. If we were to say that my useful earning capacity in the practice of law would end at the age of sixty-five, which of course we know from Mr. Davis's example that is not true in many instances, I would have missed thirty-four years of earning capacity as a private practioner of law.

I believe in those thirty-four years I would have earned in excess of $850,000 more than I will earn as a professor of law.

Q What is the basis of your belief which you have just expressed that over a period of thirty-four years your earnings would have been $850,000 more than they will be?

A I don't think I can be more precise than to say that my earning capacity as a professor of law will be

very substantially less than in the private practice of law.

Q Are you able to fix an amount?

MR. JAROSLAWICZ: Do you want a specific dollar number?

MR. TERSIGNI: He has already given me a dollar number; $850,000. I am trying to find out what that is based on.

A When the complaint was drawn up, the amended answer had been drawn up, I had taken the figure $25,000 per year as the differential, as what I thought I might be able to earn as a private practioner of law and what I might be earning as a professor of law.

Q You took the figure $25,000 per year as the differential?

A At the time that the amended answer was drawn up, that is the figure that I used to ask my attorneys to put that amount in.

Q What was the basis for that figure?

A Well, as I have already testified, I cannot be more precise than to say that it was my best estimate at the time that that would have been the differential, what I would have made as a practioner of law as opposed to a law professor.

Q Is that also your best estimate today?

A My personal best estimate. I don't have any additional facts today than what I had when this amended answer was drawn up.

Q My question is, is $25,000 differential still your best estimate today?

A Yes.

Q On what is that estimate based?

A I am afraid I have already answered that question three times, Mr. Tersigni.

Q What I am asking you, Mr. Goldberg, is what is the $25,000 differential which you have set as your best estimate today based on?

A I can only say it was and is my opinion as to what the differential would be.

Q Is it any more than an opinion?

A No, sir. I know what my salary is as a professor of law. That fact I have. I cannot give you any other indicia of what went into the opinion as to what I would be making in the future as a private practioner.

Q Is it your claim that this $25,000 differentia over thirty-four years is the result of damage to your reputation?

A Yes, sir.

Q Is it the exclusive result of damage to your reputation?

A Yes, sir.

Q On what is that based?

MR. JAROSLAWICZ: I object to the form of that question. It is not a question.

Q The question is, on what is that based?

MR. JAROSLAWICZ: On what is what based?

MR. TERSIGNI: What he just said.

MR. JAROSLAWICZ: It is a half question. I prefer counsel asking a question which can be responded to completely and accurately.

Q On what do you base your opinion that the $25,000 differential you have testified about, over the next thirty-four years, is the exclusive result of damage to your reputation?

A Because the thing that resulted from the damage to my reputation is the preclusion of a successful private practice and the resulting necessity of me making my livelihood as a professor of law.

Q Is it your testimony that you would rather be practicing privately than teaching law?

A Yes, sir.

Q Have you made any attempts to engage in

private practice?

A Yes.

Q When did such attempts begin?

A Approximately two or three months --

MR. JAROSLAWICZ: You mean after his reputation was ruined?

MR. TERSIGNI: After his reputation was allegedly ruined.

A Approximately two or three months after I appeared before the Commission on January 22, 1973, I made a very diligent effort to return to private practice as an employee of a law firm or to obtain continued exposure in the writing or lecturing area where I was hoping to build up my practice.

I was completely unsuccessful and in September of 1973 took the only alternative I had to make a living in the practice of law,or related areas, by becoming a professor of law in New York Law School.

Q Is it your testimony that your becoming a professor in New York Law School was the last alternative available to you?

A Yes, sir. I don't want the record to be incomplete and in any way say that I am not proud to be associated with New York Law School or to be a professor there.

But I do want to indicate for the record that the accepting of employment at New York Law School, which had been offered to me on many occasions prior to this incident and which I had consistently refused, the acceptance of that employment was based completely on the fact that I was unable to earn a livelihood in any other manner in the practice of law.

Q Is it your testimony that if you had otherwise been able to earn a livelihood that you would not have desired a position at New York Law School?

A Yes, sir. My continuing rejection of the offer which had been offered many times before these occurrences would indicate that.

Q Is that still your feeling today?

A Could you ask the question again?

Q Is it still your feeling today that the only reason you continued as a professor of law at New York Law School is that you believe you are unable to earn a livelihood in any other way in the legal profession?

A Yes, sir.

Q If there were any other way you could earn a livelihood today in the legal profession, you would rather do that than be a professor at New York Law School?

MR. JAROSLAWICZ: He said he would rather be in private practice.

MR. TERSIGNI: That is not what he said.

Q Would you answer my question, please?

A If I could return to a lucrative private practice or a private practice as an employee of a reputable law firm, I would prefer that, yes.

Q When you say "a lucrative private practice," can you be more specific as to what you mean by that?

A Yes, I would want to return to the private practice of law in the corporate securities area. That is what I was referring to.

Q What were you referring to when you characterized the practice as lucrative? Can you be more specific as to the word "lucrative"?

A Yes. Just that I would be happy to accept an offer from a reputable law firm, such as your own, at a salary commensurate with being out of law school for seven years or five years or any employment that would put me back into the position that I was in, doing the work that I was doing in the securities field.

Q What salary, if any, do you believe would be commensurate with being out of law school for five to seven years?

MR. BERGADANO: Five to seven years is implicit in that.

MR. TERSIGNI: Taking your experience into consideration.

A It would be a speculation. If you want me to speculate, I can.

MR. JAROSLAWICZ: Please don't speculate. I direct the witness not to guess.

MR. TERSIGNI: He has already testified that he would be willing and desirous of accepting what he has characterized as a "lucrative position in private practice."

I have already asked him to specify what he means by "lucrative," and he testified he means by that a position which would pay commensurate with his experience, having been out of school for five to seven years.

I am now asking him what his belief is and I think his state of mind on that question is absolutely relative.

Q What do you consider to be a salary commensurate with your having been out of law school five to seven years in the light of your experience?

A I would imagine today it would be around

$26,000 to $30,000. That is a speculation but you have asked me for that.

Q Is that your best judgment?

A Yes, it is.

Q How much do you make at New York Law School as a professor?

A I believe my salary this year is $23,500.

Q If we take the maximum which you just told me would be your best judgment of a salary commensurate with your experience and years out of law school, which would be $30,000, and we subtract from that the $23,000, that would leave a differential of $7,000; is that correct?

A That is inaccurate because in addition to a salary in a law firm I would also have hoped that I could generate business for the law firm where I would be receiving a portion of the fees that I could be generating for the law firm.

Q Is it true that the difference between $30,000 and $23,000 is $7,000?

MR. JAROSLAWICZ: We will stipulate to that.

Q Is it still your testimony that you believe what you could earn as a professor and what you could

have earned had your reputation not been damaged in your opinion is $25,000 a year?

MR. JAROSLAWICZ: Professor Goldberg referred to an average of $25,000 over thirty-four years and you are asking him whether that $25,000 figure is applicable for that without taking into account, as he got older, increments.

He said it was $850,000 over thirty-four years at $25,000 a year. He said it averaged out to that.

MR. TERSIGNI: I don't recall him saying anything about average.

A I believe the top salary at New York Law School, this is my best information, I do not have the figures, but I believe the top salary at New York Law School is $24,500. In other words, I think I am within a thousand dollars of the maximum income I can expect at the Law School and that is where my income will stop for the rest of my life.

Q Do you intend to remain a professor at New York Law School for the rest of your life?

A Yes, because I don't think I have a choice.

Q What is that belief based on?

A Many things.

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Q Name a few.

A Because of the publicity generated by this case.

Q What do you mean by that?

MR. JAROSLAWICZ: I object to the form of that question.

Q What are you referring to?

A Specifically a front-page article in the NEW YORK LAW JOURNAL which front page article was in -- may I see that list, please? In the August 31, 1973 edition of the NEW YORK LAW JOURNAL on the front page there was an article entitled "Ethics Violation Found in Securities Offering."

In that article it has my name prominently displayed as the recipient of an injunction by a federal judge for eithics violations.

Prior to that date I had authored nineteen front-page articles, approximately one a month for the very same NEW YORK LAW JOURNAL, which is the publication of record as officially designated pursuant to the judiciary law of the State. The nineteen front-page articles, which I had my picture and my name on them, they were all on securities law. The title of the column was "Securities Law."

Within a day of this publicity, this ethics

violation, I received a phone call from the NEW YORK LAW JOURNAL informing me that in view of these facts as related in this article, my front-page column was being immediately cancelled and that I would no longer write for the paper, that my articles would no longer be acceptable to them. That is the best example I can give you of how the publicity in this case has destroyed my reputation.

Q Is the article that you have just referred to an article discussing the decision of Judge MacMahon in the Meyerhofer case?

A Yes.

Q And who at the LAW JOURNAL called you and told you the things you just mentioned?

A The phone call came from Mr. Charles F. Kiley, the editor in chief of the NEW YORK LAW JOURNAL.

The information was further confirmed by the vice chairman of the board of editors, Mr. E. Donald Shapiro.

Q Were any of these communications in writing?

A No.

Q Can you recall how many phone calls you had on this subject with representatives of the LAW JOURNAL?

A One was more than sufficient.

Q Be that as it may, my question is, do you recall how many you had?

A Yes. One from Mr. Kiley informing me that I was no longer associated with the NEW YORK LAW JOURNAL.

There were other conversations that took place between Mr. Shapiro and myself but that was the one specific phone call related to the termination of my services.

Q Is it your claim, Mr. Goldberg, that the contents of Judge MacMahon's decision as publicized where damaging to your reputation?

MR. JAROSLAWICZ: I object to that question and direct the witness not to answer. That is a loaded question by saying "the contents of Judge MacMahon's decision."

I don't care what publicity was concerned, that is damage to Mr. Goldberg --

Q Is the article that you have been discussing an article discussing Judge MacMahon's decision?

MR. BERGADANO: The article speaks for itself.

MR. JAROSLAWICZ: I join Mr. Bergadano in that.

MR. TERSIGNI: You may answer.

MR. JAROSLAWICZ: I direct the witness not to answer.

MR. TERSIGNI: Mr. Jaroslawicz, all questions objected to are to be answered subject to the objection. Objections to admissibility, competency or other things of that sort are to be reserved for the trial.

MR. JAROSLAWICZ: I didn't enter into that stipulation.

MR. TERSIGNI: You don't have to. It is in Rule 30 of the Federal Rules.

MR. JAROSLAWICZ: I direct him not to answer.

MR. TERSIGNI: On what basis?

MR. JAROSLAWICZ: That we have the article here, sir. I don't want the witness to give expert testimony as to what is in the article. If you want to obtain Mr. Goldberg's services as an expert, you pay him an appropriate fee and he will explain any and all articles to you.

MR. TERSIGNI: If you object to the form, I will rephrase it. If not, I call for an answer.

Q Is the article that you are discussing an article concerning the decision of Judge MacMahon in the Meyerhofer case?

MR. JAROSLAWICZ: The article speaks for itself. I direct the witness not to answer. If you want to know if the article refers to Judge MacMahon, I will permit him to answer.

MR. TERSIGNI: I would like him to answer my question.

MR. JAROSLAWICZ: I direct him not to answer the question in the form put to him.

Q Is the article that you have been testifying to an article of Judge MacMahon's decision in the Meyerhofer case?

A In part, yes, sir.

Q Is it your claim in this case that the references in this article referring to Judge MacMahon's decision damaged your reputation?

MR. JAROSLAWICZ: Without the rest of the article.

Q My question is very clear. Is it your claim in this case that the references to Judge MacMahon decision in the Meyerhofer case were damaging to your reputation?

A Yes.

Q Is there anything else in that article other than any references to Judge MacMahon's decision which you claimed damaged your reputation?

A Almost everything in the article under the caption "Ethics Violations Found in Securities Offer," which is directly under a by-line entitled "Lawyer, Firm Cited in the United States Court," everything in that article ruined my reputation.

Q Do you know who authored that article?

MR. JAROSLAWICZ: Of your own knowledge.

MR. TERSIGNI: I don't care whether it is his own knowledge or from hearsay.

Q Do you know who authored the article?

A As with you, Mr. Tersigni, I can read the article. It says --

Q I am sure you can read it.

A S. James Rosenfeld, it says.

Q Did you ever talk to Mr. Rosenfeld about this article?

A He spoke to me about it. I am very careful to state -- let me tell you the whole conversation so we can be accurate on the record.

The phrase "talk to" connotes that there was a

[illegible]

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In other words, if the response was to simply mail to you or make available to you a transcript, I am not asking for that. If a response was made by letter, for example, to your request, I would want that or any other communication that you may have received from the Commission.

MR. JAROSLAWICZ: We will take the same action as we did with your other request.

MR. TERSIGNI: What is that?

MR. JAROSLAWICZ: We will search our records and if we have them we will take it under advisement.

Q Am I correct that you accepted the professorship at New York Law School in September, 1973.

A No.

Q When was it?

A My acceptance -- you mean the oral or the written?

Q Were they at or about the same time?

A No.

Q When was the oral acceptance?

A That was in or around I believe the latter part of May, 1973?

Q Do I understand you to be saying that at or about the latter part of May, 1973 you communicated orally to New York Law School that you were accepting a position on the faculty?

A Yes.

Q And then you confirmed that in writing?

A I am not sure whether or not there was a written confirmation. My contract, I think, was in or around September but I am not sure about that.

Q But at any rate you accepted the position in May of 1973 and so advised the Law School?

A Yes.

Q How long before the latter part of May, 1973 had you applied to the Law School for a position?

A I never applied.

Q How did the subject come up?

A The dean of the Law School asked me at, I believe it was a dinner, and he then informed me that I was accepting a position at New York Law School.

Q Who was that?

A E. Donald Shapiro.

Q And he asked to meet with you at the dinner?

A Yes.

Q And he told you at the dinner that you

accepting a position at the Law School?

A Yes.

Q And what did you say, if anything?

A I believed that his logic was infallible and that he was correct.

Q What was his logic?

A Over dinner time he told me that I was, his phrase, "dead in the legal community" because of this case.

Q What case is that?

A That is the matter of what had happened at the Securities and Exchange Commission.

Q Did he refer to you having gone to the Commission in January of '73 and made disclosures about the Sitomer, Sitomer firm?

A No, I don't think he specifically referred to that, I think -- I am not sure what phrase he used. Something about the Commission's investigation, somethin like that, and everything that's been going on. Something like that.

Q Do you recall when this dinner meeting took place?

A Yes, the latter part of May, 1973.

Q So it was at or about the time that you

accepted?

A Yes.

Q Or did the meeting and the acceptance occur at the same dinner meeting that you have been telling us about?

A Yes.

Q Did he tell you how he came to propose that you join the faculty?

A Yes.

Q What did he say about that?

A He said, "As you know, we have been trying to get you to come with us for a long time," which is true, "and now you have no choice, you are dead in the entire legal community. Everybody knows about what is going on; therefore, you have to accept our offer this time." And I agreed with him, yes.

Q Did he say what he meant by, "Everybody knows what is going on"?

A No.

Q What did you understand him to be saying when he said that to you?

A The Securities Bar is a small one. New York City may be large, but the Securities Bar is a small one. Information travels by the grapevine faster than it

does by the newspaper and the message that I received from him was that everyone was aware of the S.E.C.'s investigation.

Q Is it your claim that as of the time you spoke with the dean of New York Law School in May of 1973 that your reputation had been damaged?

A Yes.

Q How had it been damaged as of that time.

A As of May, I believe, but I am not certain about the chronology, that Glacier General Insurance Company had been forced by the Commission to recirculate their prospectus. I believe it was before May. I also believe that this prospectus went to some 200 underwriting firms and that if the Securities Bar is a small world, the brokerage community is even smaller. The amended prospectus of Glacier General Insurance Company contained a caption and then I think some two pages of writing entitled "Substitution of Counsel" which was the most disgraceful single communication I have ever read in my life.

Q Did that communication refer to you?

A No, it referred to the law firm of Sitomer, Sitomer & Porges, and it virtually branded them as --

MR. DAVIS: Where did that appear?

A Glacier General Insurance Company, your client, had written a prospectus for them and it had come out, preliminary prospectus had come out before these incidents took place when I went to the Commission. After my going to the Commission, the Commission forced Glacier to issue an amended preliminary prospectus. In the amended preliminary prospectus there was a caption called "Substitution of Counsel." And the Commission required that that amended prospectus be circulated to all persons who had received the first prospectus,which someone told me, I don't know where, that two hundred brokerage firms received that prospectus. And the disclosures under the caption "Substitution of Counsel" were the most disgraceful thing I ever saw in my life.

Q You started to say that they branded the Sitomer, Sitomer firm --

MR. JAROSLAWICZ: I object to the word "branded."

MR. TERSIGHI: I am repeating the witness's testimony and I pointed out to him that he used the words.

Q What did you mean when you started to say "Branded the Sitomer, Sitomer firm"?

A Without choosing adjectives, branding them as dishonest.

Q Did it brand you as dishonest?

A My name is not specifically mentioned, but when I was looking for a job, my resume contained the fact that I had been employed by the firm and every place I went, as soon as they saw Sitomer, Sitomer & Porges on the resume, right away the questions started with, "Oh, are those the ones that..." and, "Did you work on...," and "Can you tell us what the situation is?"

Q When you had this conversation in May of 1973 with the dean of New York Law School --

A One technical correction. I don't think that Mr. Shapiro was the dean of New York Law School on the day we had the conversation. I think it was within a few weeks after that.

Q That he became dean?

A Yes, but at the time of our conversation I think -- well, I know he was on the board of trustees and he had been for many years and I believe his official title might have been vice chairman of the board.

Q I will refer to him as Mr. Shapiro, in any event.

A You can refer to him as Dean Shapiro.

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Q When Dean Shapiro had this dinner meeting with you and told you that you were accepting a position at the New York Law School, was there any discussion as to whether your character and reputation were consistent with your being a professor at the Law School?

A Yes.

Q Did he tell you he thought your reputation was not good enough to be a professor?

A He told me that he would have a hell of a job selling it to the board of trustees.

Q That is not my question. My question is, did he tell you that in his opinion your reputation was not good enough for you to be a professor at the New York Law School.

A He told me that in his personal opinion he thought it was but that he would have considerable trouble with the board of trustees. It was a very prophetic statement.

Q Would you explain that?

A Yes. It got to a point where there was an emergency meeting of the board of trustees called the day after that article appeared in the NEW YORK LAW JOURNAL which was a few days before I was

scheduled to commence teaching classes. It has been related to me that the sole topic of conversation was, "How could we have an unethical attorney in the school?". The final result was that Dean Shapiro had to put his job on the line for my job.

Q You say that meeting was occasioned by the August 31 article in the LAW JOURNAL which referred to Judge MacMahon's decision?

MR. JAROSLAWICZ: I object to the form of that question. You have the article; let's mark it. I will not permit you to put any innuendo which is misleading and calculated to a certain result, which you are well aware of, into a question.

MR. TERSIGNI: Are you saying that all of those terrible things are going to disappear if I mark this for identification?

MR. JAROSLAWICZ: Yes.

MR. TERSIGNI: Okay, let's mark it and I would like him to answer the question.

(Copy of article entitled "Ethics Violation Found in Securities Offering," from August 31, 1973 issue of NEW YORK LAW JOURNAL marked Plaintiffs' Exhibit SCG-26 for identification as of this date.)

Q I show you Exhibit 26 for identification and ask you whether that is a copy of the August 31, 1973 Law Journal Article about which you have testified this morning?

A Yes.

Q And was it the appearance of this article that occasioned the meeting of the trustees of the New York Law School which you just mentioned a few minutes ago?

A As represented to me, yes.

Q Is that your understanding that it was this article that occasioned this meeting?

A It was my understanding.

Q Prior to the appearance of this article, Exhibit 26 for identification, which occasioned the trustees meeting that you have mentioned, had anyone at New York Law School questioned your reputation with respect to your being a member of the faculty?

A Yes.

MR. JAROSLAWICZ: To his knowledge.

MR. TERSIGNI: He can only tell me as to what he knows.

Q Who was it that questioned your reputation?

A I am told that Dean Shapiro was fielding numerous

questions that had not been made to me directly. I am relating what Dean Shapiro had told me.

Q When had Dean Shapiro told you that?

A I had meetings with Dean Shapiro.

Q Do you understand the question?

A Yes, I do.

Q The question is when had he told you that?

A I am unable to answer it but I am trying to give you the framework.

Q You are unable to fix a time-frame?

A They were continuous.

Q Can you tell me what month or year or months or years that you were told those things?

A Yes.

Q Tell me.

A From May to September.

Q My question is prior to the appearance of this article, which is Exhibit 26, had anyone at the Law School questioned your character and reputation with respect to your being a member of the faculty?

A Yes.

Q When were those comments made to you?

A From May to September.

Q Were all those comments made to you prior

to the appearance of this article?

A Your question was were there comments regarding my reputation before the article appeared. My answer was yes.

You asked when. My answer was May to September.

Now you are asking were all those comments made before the article.

Q You said from May to September. Now I am asking you specifically, were all of those comments made before this article appeared on August 31?

MR. JAROSLAWICZ: We can stipulate that August 31 is the last day before September.

MR. BERGADANO: He was responding to a series of questions relating to before the publication. Now your question incorporates those along with the article which is dated August 31. I think that may create the confusion.

If you change the wording of your question in that framework, I think the witness would not have problems with it.

Q Prior to the appearance of the article marked Exhibit 26 for identification, did anyone raise a question with you regarding your reputation or character as far as your being a member of the faculty?

A Yes.

Q Who raised the question?

A Dean Shapiro.

Q When?

A Continuously from May to September when the article appeared, and then the questions were more numerous, more people.

Q For the time being I am only concerned with the period prior to the appearance of the article. On how many occasions can you recall did Dean Shapiro raise such questions with you prior to the appearance of Exhibit 26 for identification?

A Continuously from May until that article.

Q Would you summarize the nature of the points which Dean Shapiro was raising with you during that period?

MR. JAROSLAWICZ: I object to a summary. If you want to know what was said by whom, he will be happy to respond as accurately as he can.

Q Tell me in substance what Dean Shapiro told you over this period.

A Yes; from May on until this article appeared, we are concerned with that period of time?

Q Yes, sir.

A From time to time Dean Shapiro would see me, usual in his office. I would respond to a phone call from him and he would tell me of the numerous questions that would come from numerous people in the securities community.

I might add, Dean Shapiro at that time was in some way associated, I think, I don't know whether he was a limited partner or a general partner of Anderson & Company , but Dean Shapiro was associated with a big-board brokerage firm, so he was in the same financial community. From time to time he would ask me questions about the matter. He had the various information as it became available and he just reported numerous communications that he had had with various attorneys and trustees on the board that he answered to regarding my reputation.

Q Did he ever report any comment to you from anyone to the effect that they did not consider you to be of good reputation?

A Yes.

Q How many times did he report such a comment?

A I may be using what happened the day or days after that article appeared.

Q I am talking about before the article.

A Before the article appeared, I do not have any present recollection of Dean Shapiro specifically telling me that X considered my reputation was bad.

The form of the conversations was that Dean Shapiro had been at such and such a meeting and that he had heard such and such;and then he had been at another meeting and he asked me whether or not any Bar Association complaint had been made against me; and at another meeting he asked whether or not any charges were filed against me by the Bar Association. There was just one rumor after another that he was calling me up to verify or deny.

Q Did Dean Shapiro at any time prior to the appearance of this article tell you that he considered your reputation to be not consistent with your being a professor at the law school?

A He told me that -- he personally told me that he personally considered I had a good reputation. But every time he would tell me that it would always be at the end of a conversation where the tenor of the conversation was that he was getting increasing pressure on my appointment.

Q And that was prior to the appearance of

this article?

A Yes, I am responding to the period before. There were additional conversations after but I am responding to the period before.

(Witness and counsel confer.)

Q Is there anything you wish to clarify?

A Yes.

MR. JAROSLAWICZ: No.

MR. TERSIGNI: Whose testimony should we take?

MR. JAROSLAWICZ: I am directing the witness not to volunteer, merely to respond to questions.

MR. TERSIGNI: He just said yes.

MR. JAROSLAWICZ: If he wants to respond to a question that is what he is here for.

A I don't know how technically we are using the word "reputation" from a legal standpoint.

Dean Shapiro had told me back in May that I was "dead" in the securities field.

Q Did he use that word?

A Yes, that is the exact word he used. I remember it clearly.

Q Go ahead.

A Dean Shapiro had told me that my reputation had been completely destroyed but Dean Shapiro was distinguishing what was happening to me in the securities world of New York and what his personal opinion of what my character was. And he distinguished it by saying that he personally thought that I was of good character and that he personally wanted to see me on the staff of New York Law School.

I hope that clarifies it.

Q Did he tell you what he meant when he used the phrase "dead in the securities field"?

A Yes.

Q What did he say?

A He said that I could -- first he inquired as to my efforts to get a position and I told him what they were.

Q What did you tell him specifically?

A That I had made a very diligent effort to find employment but I couldn't. And he said, "Of course not. You're completely dead in the securities industry here," or securities something. And he said, "There is no way that you could ever be employed until this thing blows over."

I think those were the words he used, and that "We

have been trying to get you for a number of years and now you will accept a position to teach at New York Law School."

Q Did he tell you why he considered you to be "dead in the securities field"?

A Yes.

Q What did he say?

A Because of what had happened.

Q What did he say?

A Specifically because of the S.E.C.'s investigation and everything that is coming out.

Q Did he say it would be difficult for you to find employment because you had gone to the Commission and made disclosures about your former employer?

A No.

Q Was that ever discussed with Dean Shapiro?

A That I had gone to the Commission?

Q And made disclosures about your former employer?

A Yes, of course.

Q Was there any discussion as to whether or not that would have a bearing on some other firm employing you?

A No.

Q What discussion was there on that subject?

A Dean Shapiro referred to the S.E.C. investigation and he did not break out any specifics. Dean Shapiro understood the extreme limitations that I had in discussing the matter. One of the most difficult things in seeking employment was my problem of making some sort of a disclosure to that employer yet not disclosing confidential matter. It was a very difficult line.

Q Are you able to testify that any employer which you consulted with respect to a possible position from January through the end of May, 1973 may have been reluctant to hire you because you had gone to the Commission and made disclosures about your former employer?

MR. JAROSLAWICZ: I object to the form of that question.

MR. TERSIGNI: What is the objection?

MR. JAROSLAWICZ: He has no idea what they may have felt or may have been reluctant about.

MR. TERSIGNI: Then let him so testify.

MR. JAROSLAWICZ: I refuse to let him testify to someone else's probable state of mind.

MR. TERSIGNI: He may know.

MR. JAROSLAWICZ: Well, if you tell me how that would come about unless they told him or unless he saw a document. Unless you want to ask him if he was told or saw a document, I direct him not to answer.

MR. TERSIGNI: Your objection is to form?

MR. JAROSLAWICZ: Correct.

Q Were there instances where you applied for a legal position from January, '73 to the end of May, 1973 and did not obtain it?

A Yes.

Q Do you know the reasons why no position was offered to you?

A No.

Q So you are unable to tell us why; isn't that right?

MR. JAROSLAWICZ: Unable to tell you why what?

Q Why a position was not offered to you.

A I am able to tell you the questions that were asked.

Q That is not my question.

A No, Mr. Tersigni, I can't tell you why [illegible]

attorney made a decision.

Q And you don't know whether it is because the employers that you applied to thought your reputation was bad or they thought you didn't have qualifications or what the reason may have been; isn't that true?
A From the questions I was asked, I can surmise why.

Q I am asking you to answer my question. You are unable to tell me what the reasons were; isn't that true?

MR. JAROSLAWICZ: I object to the form of that question. You want to know whether he was told what the reasons were?

MR. TERSIGNI: No. I want an answer to my question.

MR. JAROSLAWICZ: Your question makes no sense in the form it was asked and he can't respond to it.

Q Do you understand my question?
A Yes.
Q Do you think you can answer it?
A My way, I can.
Q Answer it.
A I can infer.

Q . I don't want you to infer. My question is, do you know what the reasons were why you were not offered a position?

A You enlighten me about your question. What do you mean by "know"? Did I see a document or did they tell me? What do you mean by "know," and I will answer the question?

MR. JAROSLAWICZ: I as well as the witness was obviously confused; that was the reason for my objection.

Q Did any employer ever give you a reason why you were not being offered a position?

A No.

Q Did any employer ever tell you that they were not offering you a position because they felt you had a bad reputation?

A No.

Q Did any employer ever tell you they were not offering you a position because they didn't think you had the legal qualifications?

A No.

Q Did any employer ever tell you they didn't want to hire you because you had made revelations to the Commission about your previous employer?

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A No.

Q Did any employers tell you they wouldn't hire you because they considered you to be unethical?

A No.

Q Did any employers tell you they would not hire you because they considered you to have committed misconduct in any fashion?

A No.

Q Did you have any knowledge or information as to the reasons why you were not hired?

A Yes.

Q What is the basis of that knowledge or information?

A The questions that I was asked.

Q From which you inferred certain things?

A Yes.

Q Tell me the questions that you were asked from which you infer what you have just testified.

MR. JAROSLAWICZ: It has been asked and answered but answer it again.

A I was asked to tell them fully what had taken place at the Sitomer, Sitomer firm that had caused me to terminate my prior employment.

Q Did you respond to those questions?

A Yès.

Q Any other questions that you were asked from which you make inferences?

A Yes. Basically I was told that my responses were unsatisfactory.

Q Were you told why your responses were unsatisfactory?

A Yes.

Q What were you told?

A Do you want to hear my responses first?

Q Yes.

A My responses were that there were matters that had occurred in the firm which forced me to go down to the Securities and Exchange Commission and reveal certain information, that there was a pending S.E.C. investigation then under way and I could not discuss it further.

Q What do you infer from those questions and the answers that you got?

A What I infer, as somebody who has done an awfully lot of hiring myself for various employers that I had been associated with when I had hired people for various positions, if someone is to say that they left the previous employer and had to go to a federal investi-

agency and that there was a current investigation taking place but they couldn't answer any other questions regarding the investigation even to the fact that they were being investigated, you just couldn't hire them.

Q Did you infer that is a damn on your reputation from the person not hiring you?

A No.

Q So the fact that the employer might be reluctant to hire someone who has gone to a federal investigatory body to make revelations about his past employer and that there is an on-going investigation, the reluctance to hire under those circumstances doesn't cause you to infer that that prospective employer is damning your reputation?

MR. JAROSLAWICZ: I object to the form of that question.

MR. TERSIGNI: You may answer.

MR. JAROSLAWICZ: You may not answer.

MR. TERSIGNI: Objections to form are no basis for the witness not to answer.

MR. JAROSLAWICZ: They are when you are asking the witness to mischaracterize and the answer will be misleading of necessity.

Q Did you in fact infer from any of your application questions and questions and statements that were made to you by prospective employers that they were questioning your reputation?

A Yes.

Q From what did you infer that?

A From the questions.

Q From the questions that they asked you about what you had done about the Sitomer, Sitomer firm?

A Yes.

Q And from the questions about your going to the Commission?

A Yes.

Q And from the questions about whether or not there was an on-going investigation?

A Certainly.

Q What was it about those questions that caused you in your mind to infer that your personal reputation was being questioned?

A It is so obvious I have difficulty answering.

Q Tell me why it is obvious, Mr. Goldberg.

A Because if a person tells you that they went to the Commission and that the Commission has an on-going investigation, but they are unable to discuss the on-going

investigation with you and they are even unable to tell you whether they are being investigated, you would have to be crazy not to question their reputation.

Q Didn't you infer from those questions that your prospective employer might simply not want to get involved in a situation like that regardless of what your own personal reputation was?

A Precisely.

Q So it wasn't necessarily what your reputation was but employers might not want to have gotten involved?

A Both.

MR. BERGADANO: Argumentative.

Q Can you tell me to what extent they were motivated by one consideration as opposed to another?

MR. BERGADANO: You are asking him for the motivation of someone else.

MR. TERSIGNI: He just said,"Both," so --

MR. BERGADANO: It is clearly objectionable. The answer must be speculative unless you ask him what the people told him or what you communicated.

MR. TERSIGNI: I think his whole claim is a guess.

MR. BERGADANO: That's your opinion. You are entitled to an opinion.

MR. TERSIGNI: You are entitled to yours and I am entitled to the man's testimony.

MR. BERGADANO: But you are not entitled to his opinions as to what was going on in someone else's mind.

MR. TERSIGNI: You agree with me then that there is no way this witness can know why he wasn't being hired?

MR. BERGADANO: No, sir, that is not consistent with what he said.

Q What do you mean by "both," Mr. Goldberg?

MR. JAROSLAWICZ: Objection.

MR. TERSIGNI: What is the objection?

MR. JAROSLAWICZ: Why do you want his definition as to what the term both means.

MR. TERSIGNI: His definition of the testimony he gave twenty-eight seconds ago.

Q What did you mean when you testified "both" a few seconds ago. Do you know what you meant?

A Yes.

Q Tell us.

A One, questions: inability to answer.

Two, involvement: prestigious law firm does not need to hire somebody who cannot tell them whether or

not they are the subject of an S.E.C. investigation.

Q And that is true no matter how outstanding that person's reputation may be?

MR. JAROSLAWICZ: Objection.

MR. TERSIGNI: You may answer.

MR. JAROSLAWICZ: Don't answer.

MR. TERSIGNI: What is the basis of your objection?

MR. JAROSLAWICZ: You are asking him to guess.

(Whereupon, a breif recess was taken and the deposition resumed.)

BY MR. TERSIGNI:

Q Would you answer the question, please.

MR. JAROSLAWICZ: I direct you not to answer because I don't understand it and I will not let the witness respond to any questions that I don't understand.

Q Do you understand the question, Mr. Goldberg?

A I think so.

Q In light of the fact that the witness understands the question, I would like to get his testimony and leave counsel's for some other time.

MR. JAROSLAWICZ: The witness says he "thin

so. He is not certain.

MR. TERSIGNI: Answer it to the extent you understand.

MR. JAROSLAWICZ: What is the question?

MR. TERSIGNI: That is not going to serve this deposition. This is exactly what I have been talking about. Every time I ask a question we get fifteen objections and then we read back the question.

You may not like it and it may not be admissible and you can make objections --

(Requested portion of record read.)

MR. JAROSLAWICZ: Objection. I direct the witness not to answer. It is half a question. It asked him to guess at the state of mind of someone else and it cannot be answered.

Q Do you understand the question, Mr. Goldberg?

A Not any more.

Q What do you mean, "Not any more"?

A Well, the question is asked in three parts with four interruptions and three comments in between the three parts.

MR. TERSIGNI: This is exactly what I am talking about, Mr. Jaroslawicz, and I would [illegible]

if you don't break up the testimony in this fashion.

MR. JAROSLAWICZ: I will try to accommodate you.

Q Did any employer ever tell you in words or substance that you would not be offered a position because they questioned your reputation?

A No.

Q Have you ever interviewed someone for a legal position?

A Yes.

Q In interviewing persons for legal positions, have you inquired with respect to an applicant's prior position with a prior firm?

A Yes.

Q In your mind, would it be relevant to know with respect to hiring someone for a legal position whether or not that person had made disclosures regarding his former employer to a federal regulatory agency?

A Yes.

Q Would that subject matter be separate and distinct in your mind from that person's reputation?

A Yes.

Q Would you consider it a relevant considerati

on the part of a prospective employer not to wish to become involved, through hiring, with a person who had seen fit to make disclosures about a former employer even though there may be no question about that person's personal reputation?

(Question read.)

A I don't understand your question because I don't know whether you are asking me a question as to whether it is a relevant consideration; or, in the alternative, if you are asking me a question as to whether or not an employer would not seek to become involved with a person who had revealed information about a former employer.

Q I am asking you the second and I will attempt to rephrase it. On the basis of your experience in interviewing for purposes of hiring lawyers, can you visualize that a prospective employer might choose not to hire someone who had seen fit to make disclosures about his former employer to a federal regulatory agency even though that prospective employer might have no question about the applicant's personal reputation?

A I have a problem with that question, Mr. Tersigni, because I don't know if the question relates to my experience as someone who has interviewed people for

positions; or, in the alternative, whether your question is directed as to whether I can mentally, your word, "visualize" a prospective employer, any prospective employer having an objection.

Q I am asking you on the basis of your own experience in interviewing applicants for legal positions; would it be fair to say that a prospective employer might choose not to hire someone who had seen fit to make disclosures to a federal regulatory agency about his former employer even though there might be no question about that applicant's personal reputation?

(Question read.)

A Yes, I could visualize a prospective employer who would turn an applicant down, regardless of the facts that were involved, solely on the basis that that prospective employee had gone to federal regulatory agencies concerning a previous employer.

Q So that if an applicant under those circumstances were not offered a position, it wouldn't necessarily follow that that position was not offered to him because there was any question about his reputation; isn't that a fair statement?

MR. JAROSLAWICZ: I object to the form of that question.

MR. TERSIGNI: You may answer.

MR. JAROSLAWICZ: He may not answer.

MR. TERSIGNI: Why can't he answer?

MR. JAROSLAWICZ: Because that question is not geared to obtain any information. You are asking the witness to play a game with you in answering hypothetical questions which is not the purpose of a deposition, sir.

MR. TERSIGNI: The witness has already testified as to certain inferences that he made and I am trying to explore the workings of his mind in connection with those inferences to see whether they are well-founded or not well-founded and I think I am absolutely entitled to test the witness's testimony and the correctness of his inference to which he has already testified.

MR. JAROSLAWICZ: You are allowed to ask what he inferred, not to ask him to guess what other people might infer. You are using the two, and I think deliberately so. That is why the witness is having difficulty with your questions and I am compelled to object.

MR. TERSIGNI: Are you saying that I am deliberately trying to confuse the witness?

MR. JAROSLAWICZ: I am, sir.

MR. TERSIGNI: State on the record why you say that.

MR. JAROSLAWICZ: Because you will ask one question referring to him and then make a subtle shift in the next question referring to someone else's mind and if the witness is not astute, and in many cases he is not, and if counsel cannot always grasp your subtle shiftings, the record is then contorted in giving inaccurate answers when the witness thinks he is responding to one area when he is responding to another area.

Here you have a law school professor who can't understand your questions. Imagine the difficulty I have.

Q Are you having trouble understanding my questions, Mr. Goldberg?

A I certainly am because you are asking me to visualize, using your word, a prospective employer, meaning any prospective employer, and you are asking me whether this hypothetical prospective employer might make a decision based on certain workings of his mind.

Q Let's get back to the employers that you spoke with.

MR. ARNOFF: With all due respect, the witness has interposed a claim of damage to his reputation. So far the testimony has been that there is little concrete proof to justify such claim. I think it is well within the examiner's prerogative to test how this witness perceives such damage to his reputation. And it is my understanding that the questions are appropriate in that regard.

MR. TERSIGNI: I agree with that.

MR. BERGADANO: If I may, since I am also counsel for Mr. Goldberg, I solicit you --

MR. TERSIGNI: All you are doing is delaying.

MR. BERGADANO: I solicit you to direct your questions to the facts, what the witness knows or what he was told or what he learned, not getting off into other people's minds, which is a sheer waste of time.

You want to get finished with this witness, and Mr. Goldberg repeatedly --

MR. ARNOFF: I think counsel is trying to ascertain how this witness perceives in his own mind that there was an injury to his reputation. And I think the questions that have been put to

this witness on that discovery are perfectly proper.

MR. BERGADANO: I disagree with you. Just go after facts.

Q With respect to any of the employers to whom you applied during the period January, 1973 through the end of May, 1973, when you accepted your professorship, did you infer in your own mind that any of those employers were questioning your reputation?

A Yes.

Q And you made that inference on the basis of certain questions that were asked to you, about which you have previously testified; is that right?

A Yes.

Q At that time that you drew that inference, did you consider in your own mind whether or not the failure to offer you a position might have had nothing to do with your reputation but might have been prompted simply by a desire not to hire someone who had seen fit to make disclosures about his former employer?

Did you consider that?

MR. JAROSLAWICZ: Again, I think you have made that subtle shift. The witness testified he drew an inference from the questions

that his reputation was being questioned and now you claim that he drew an inference that he was not hired for some reason.

MR. TERSIGNI: I am asking him whether in drawing that inference he considered in his own mind whether or not the failure to offer him a job was prompted not by any question about his reputation but simply by a desire not to hire someone who had seen fit to make disclosures about a prior employer.

Q Did you consider that?

A Yes.

Q You did. And what consideration did you give to that possibility in your own mind?

A Precisely that. I thought it was a possibility.

Q So are you able to tell us today that the reason that you were not hired was because there was some question about your reputation as opposed to this other possibility?

A Yes.

Q You are able to say that?

A Yes.

Q On what basis are you able to say it?

A Reputation is the opinion of the community. A

personal opinion on the part of a potential employer as to his like or dislike of my having gone to the Commission regarding a former employer is a separate matter. So far as the first matter is concerned, which is my reputation, there is no question that that had been destroyed, in that almost everyone who I spoke to on any sort of informal basis, meeting, luncheon, anything, all seem to know of a flurry of rumors regarding Bar Association actions, S.E.C. investigations, underwritings being stopped, god knows what else, that regards my reputation.

MR. DAVIS: I reserve the right to move to strike the entire answer as unresponsive, self-serving, and blatantly improper.

MR. JAROSLAWICZ: And being unhelpful to the defendant.

MR. TERSIGNI: I think it is very helpful.

MR. JAROSLAWICZ: Then why move to strike it?

MR. TERSIGNI: He didn't say he would. He said he would reserve the right.

Q Do you know why you weren't offered a job?

MR. JAROSLAWICZ: Where, when, by whom?

Q Do you know why you were not offered a job [illegible]

any of the employers that you applied to from January, '7[illegible] through the end of May, '73?

A At least three times on the record, Mr. Tersigni, I have told you I don't know what you mean when you say "know." Yet you continue to ask the questions in different forms using the same terms that I told you previously I was unable to answer.

Q Other than what you call an inference, do you have any knowledge or information as to why you weren't offered a position?

A I have no facts on that subject if that is what you have been asking me.

Q You have no facts?

A No, sir.

Q You previously testified that in your mind reputation means the community's opinion of an individual as opposed to one individual's opinion as to a person's character. Is that a fair statement?

A Yes.

Q Is it your testimony that as of May, 1973 the community's opinion of your character had been seriously damaged?

A Community's opinion as to my character or reputati[illegible]

Q Your reputation in the community had been

seriously damaged?

A Destroyed.

Q Is it your testimony that that was the result of notoriety?

A Yes.

Q What notoriety caused that to happen?

A Again --

Q The grapevine?

A As of May, 1973 you remember me testifying as to the fact that the Glacier amended prospectus had, I think, already been circulated at that time.

Q Were any of my clients involved in that?

MR. JAROSLAWICZ: Let's clarify their names, please.

MR. TERSIGNI: He knows who they are.

A How do you mean "involved," sir? Did they physically make the Glacier amended prospectus? No.

Q Did they have anything to do with the Glacier amended prospectus?

A No.

MR. BERGADANO: As far as you know.

THE WITNESS: Obviously everything I testify to is as far as I know.

Q Is it your claim that my clients damaged

your reputation by anything done in connection with the Glacier registration?

A I really don't have enough information to know the connection between Empire and Glacier. I know the Glacier president, Mr. Hayden, was introduced by Mr. Gross to the Sitomer, Sitomer firm.

Q Is it your claim that you have suffered damage to your reputation by anything that my clients did with respect to the Glacier registration which you have mentioned?

A I don't know what your clients did in relation to that.

Q Are you making any claim on that subject?

A I don't know.

Q You certainly aren't able to say here today that my clients did anything with respect to the Glacier registration that defamed you; are you?

A I don't know what your clients did in relation to Glacier.

Q Other than the statements in the revised Glacier registration which you have already mentioned, as of May 1973 when you say your reputation had already been destroyed, what other notoriety caused that to happen?

A Rumors that were circulated in the legal community

regarding a possible disbarment action or complaint, I guess is the more proper term, in the grievance committee of the Bar Association of the City of New York.

Q Did my clients, as far as you know or claim, have anything to do with the circulation of those rumors?

A I don't know.

Q Do you have any basis to say that they had anything to do with that?

A I have already said I don't know.

Q What else caused your reputation to be destroyed as of May, 1973?

A Rumors that were circulating regarding the S.E.C. investigation.

Q Do you have any knowledge or information that my clients had anything to do with those rumors?

A I don't know what your clients may or may not have done regarding those rumors.

Q Do you make any claim that my clients originated or had anything to do with those rumors?

A I don't know if I can distinguish your clients from the Sitomer, Sitomer firm or the partners of the Sitomer, Sitomer firm.

Q What do you mean by that?

A Very simple; to the extent that there was a conspiracy, it involved all the people against whom I am claiming and whatever one person did, under the theory of a conspiracy, they are all responsible for. I do not know specifically which one did which one of the acts against me.

Q Do you know that there was a conspiracy?

A I think there was.

Q I did not ask you what you think. I asked you if you know.

A You are asking the word "know" again. How many times do I have to tell you that I can't answer that kind of a question.

Q Do you have any information that there has been a conspiracy?

A That is what this whole case has been about from the beginning.

Q Do you have any information that there was a conspiracy?

A I have information that your clients acted in concert with the partners of the Sitomer, Sitomer firm on perpetrating this fraud on the S.E.C. and the stockholders of Empire.

Q Do you have any information that my clients conspired with the Sitomer, Sitomer firm to injure your reputation?

A Yes.

Q What information do you have?

A Papers that your client filed against me before Judge MacMahon.

Q Are you talking about the motion to disqualify plaintiffs' counsel that my firm filed in the Meyerhofer action?

A On behalf of your clients, yes.

Q You previously testified that as of the time that you spoke to Dean Shapiro regarding taking a position with the New York Law School your reputation had already been totally destroyed.

A I think it had been.

Q Was it destroyed by my firm's filing of the disqualification motion before Judge MacMahon?

A I don't have the specific date at this time when your motion was filed.

Q June 8, 1973.

A In that case, it would have been after.

Q I am asking you as of May, 1973 when you say your reputation had already been totally destroyed, what

did my clients do to result in that situation?

A I do not have any specific information as to what your clients may have said or did other than the fact that they acted through the Sitomer firm.

Q Do you claim that the filing of the motion before Judge MacMahon injured your reputation?

A Yes.

Q Is your claim based on that?

A One of the elements.

Q Is it your testimony that when that motion was filed in June of 1973 that your reputation had already been totally destroyed?

A Without quibbling over the word "totally," I think it had been destroyed and continued to be destroyed.

Q Did the filing of that motion by my firm result in any injury which you claim had not already taken place?

A Your motion, Sitomer, Sitomer's copy motion, the Judge's opinion, they are all elements of the damage.

Q You think that the Judge's opinion also injured your reputation?

A Of course.

Q Is there anything that you claim my clients did other than the proceedings before Judge MacMahon

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which you claim injured your reputation?

A Yes.

Q What is that?

A If you want me to put a label over the whole thing, I think it is the criminal involvement.

Q I want facts.

A I am giving you the facts. Your clients and the Sitomers acting in concert entered into a conspiracy to perpetrate a fraudulent act and because I was in the Sitomer firm at the time I was sucked up into it. And it was very foreseeable that I would have been sucked up into those acts. And when everything hit the fan, I was in front of it.

Q Do you have any facts to support your claim that there was a criminal conspiracy?

A Well, I have the fact that your client, Mr. Gross, is signing false confirmations. I have the fact that your client is entering into guarantees with the Bank of Commerce regarding the Sitomer loan and then lying on the confirmation to the auditors about the existence of the guarantee. I have the facts that when the Sitomers go down to swear under oath testimony in the S.E.C. that Alvin Sitomer lies as to the existence of the guarantee that he personally

signed --

MR. ARNOFF: I object to the form of the questions and move to strike the answers as not being responsive. I would also object to the use of the term such as "conspiracy" in the examiner's questions as calling for legal conclusions on the part of this witness.

MR. BERGADANO: I suggest you reserve your objection until the witness has answered.

(Discussion off the record.)

Q Continue with your answer. Are there any other criminal conspiracies you want to tell us about?

A Various acts; one conspiracy.

Q Are you finished or do you want to add something?

A I was interrupted a few moments ago.

Q Was it your position that Mr. Gross lied?

A When?

Q Do you remember saying just a minute ago that he lied in writing a confirmation letter?

A Yes.

Q Is it your position that the letter he wrote was not only inaccurate but that it was an [illegible]

falsehood?

A Yes.

Q What facts do you have to support that?

A The facts that there was a guarantee that the representation letter to the CPA firm asked if there was a guarantee and Mr. Gross signed a letter to the effect that there was no guarantee when we all know that there was.

Q Anything else to support your claim that he lied?

A You are asking me to review all of his testimony now?

Q What else do you know that supports your claim that you know he lied?

A My present recollection of all of Mr. Gross's testimony at the S.E.C. and --

Q Anything you can remember? What about Mr. Sitomer or Mr. Gross; which one do you say lied?

A Well, Mr. Alvin Sitomer specifically committed perjury before the S.E.C.

MR. ARNOFF: Note my objection.

Q Mr. Alvin Sitomer committed perjury before the S.E.C.?

A Right.

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Q What facts do you have to support that?

A The fact that in Mr. Alvin Sitomer's testimony before the S.E.C. he was asked very specifically as to the date of his knowledge as to a certain transaction which occurred at the Bank of Commerce.

Alvin Sitomer testified that he had no knowledge as of a certain date. Then it turns out that through documentory discovery of the S.E.C. that not only did Alvin Sitomer have the knowledge that he disclaimed but he even personally signed the letter which contained the knowledge that he was disclaiming. And in fact in the S.E.C. complaint against Sitomer, Sitomer & Porges, et al., I think paragraph 19 specifically states that Alvin Sitomer lied under oath. That is perjury.

MR. ARNOFF: Note my objection to this testimony as to this witness's legal conclusions as to what is or is not perjury or false testimony under oath, and I move to strike.

Q Anybody else you claim committed perjury?

A Before the S.E.C. Investigation?

Q Or in this case?

A An awful lot of inconsistencies I can't explain but I am not ready at this time to say perjury.

Q Are you saying [illegible] perjured himself in [illegible]

case?

A I don't remember everything about his testimony.

Q Do you say his testimony in this case about that confirmation letter was perjury?

A . I have not reviewed his testimony.

Q But you say he lied when he wrote the letter?

A I have not reviewed his testimony for today's EBT. I have read his testimony when he originally made it and I was present at his EBT.

Q Do you claim that Alvin Sitomer committed perjury in this case in addition to what he said at the S.E.C.?

MR. BERGADANO: When you say "in this case," you mean his testimony as a witness or --

MR. TERSIGNI: Mr. Goldberg was present at the session, yes.

A I do not have a present recollection of precisely what Alvin Sitomer said at his EBT.

Q But you do have a present recollection of what he said months or years before at the S.E.C.?

A When you read the S.E.C.'s thing that he lied under oath --

Q What is posed to you?

MR. BERGADANO: Save your cross examination for the courtroom and don't argue with the witness.

MR. TERSIGNI: I am trying to understand the basis of his testimony.

MR. BERGADANO: You are also badgering him. He very clearly testified that what the S.E.C. says is gospel.

MR. JAROSLAWICZ: He testified that was one of the facts he was relying upon.

Q Anybody else, Mr. Goldberg; did Mr. Aschkenasy perjure himself in this case?

A I don't know.

Q Anybody else? Mr. Kaplan?

A I don't know.

Q How about Mr. Stephan Sitomer; were you present at the several sessions of his testimony?

A Yes, I was.

Q Were you present when he testified about certain things that were told to you and certain documents that you saw?

A Mr. Tersigni, you are asking me about thousands of pages of testimony right now.

Q Do you recall that testimony?

A I recall being present, sir. I do not recall the contents specifically.

Q Is it your claim that Mr. Stephan Sitomer committed perjury in his deposition?

MR. ARNOFF: I will object to that.

MR. BERGADANO: You are asking for the witness's opinion?

MR. TERSIGNI: He has been volunteering it all over the place.

MR. BERGADANO: You have elicited and pushed for his opinion.

MR. TERSIGNI: He has already given them and I am trying to cover the field.

MR. BERGADANO: Only because you asked for it and continued to ask for it and that is not proper examination.

MR. TERSIGNI: I have asked. He has responded and I am now asking again. Do you claim that Mr. Stephan Sitomer perjured himself in this case?

MR. ARNOFF: Objection as to form.

MR. BERGADANO: I join the objection. You are asking for the witness's opinion and not facts and knowledge.

Q Do you want to answer that question?

MR. JAROSLAWICZ: The witness has been directed not to answer on the grounds that if you ask him for facts he is happy to supply them. If you want opinions, you will have to retain his services as an expert.

MR. TERSIGNI: Then I reserve the right to strike all opinions that he has given as to who perjured himself or lied.

MR. JAROSLAWICZ: Lying is a fact.

MR. TERSIGNI: I would like this witness to tell me what he claims. If you direct him not to answer on the ground that he is speculating I will be delighted to join in that.

Q Do you claim Mr. Stephan Sitomer has perjured himself in this case?

MR. JAROSLAWICZ: By that you mean lied under oath?

MR. BERGADANO: Do you mean his deposition

MR. JAROSLAWICZ: The witness has already said that he doesn't have a deposition in front of him.

Give him your answer.

A Stephan Sitomer's statements regarding his prior

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knowledge of the firm's policies regarding contingent fees are lies.

Q Under oath?

A Yes.

Q What about Mr. Porges' testimony; do you claim he perjured himself also?

A Well, here I cannot recollect specifically whether he said that he discussed contingent fees with me. If he did, it would be a lie because he did not.

Q It wouldn't be a mistake or a faulty recollection; it would be a lie?

A I think so.

Q Is there any other publicity other than the Glacier revised registration statement which you have already mentioned --

A Revised prospectus.

Q -- which you have already mentioned and the rumors which you have mentioned that were circulating in the community regarding a matter before the grievance committee and other rumors about the S.E.C. investigation that were circulating in the legal community, is there any other notoriety that you claim injured your reputation up to the period ending the latter part of May, 1973?

A Yes.

Q What is that?

A Rumors regarding my conduct in going to the S.E.C. in January of '73.

Q These were rumors circulating in the legal community?

A Yes.

Q Is it your claim that my clients originated those rumors?

A Either personally or through their agents, yes.

Q What agents?

A Sitomer, Sitomer & Porges.

Q Do you have knowledge that the Sitomer, Sitomer, Porges firm originated those rumors?

A Yes.

Q What knowledge do you have?

A Unfortunately, as with rumors, they are so very difficult to trace back. I have only been able to trace one back definitely or perhaps two.

The first rumor that I have traced back was by -- the name escapes my mind, but I will tell you the circumstances and I think you can supply the name for the record. When this case originated there was a claim made that Mr. Hoeniger's firm was looking for office space and that he was introduced to the Sitomers

who were seeking to rent office space by a man whose name I can only guess at as Marlow. I don't know if that is a proper name.

Q Are you referring now to the motion that was filed in June of '73 by the Sitomer firm before Judge MacMahon?

A I think so.

Q Okay, go ahead.

A In the papers it was made to appear that when the Hoeniger firm went to rent the office space of the Sitomer firm they had seen certain documents around, etcetera. The man who introduced the Hoeniger firm to the Sitomer firm -- Mr. Tersigni, was his name Marlow?

Q I don't know.

A The name doesn't ring a bell?

Q The name sounds familiar to me.

A I say for the record that I am not sure that was the one. I have learned through a telephone call that I made to him that he was told by the Sitomers that I had ran down to the S.E.C. to turn them in, that I had been involved all along, that it had been my papers and my opinion they were following and that I just simply turned them in to get myself out of trouble.

That is one rumor I have traced back.

Another rumor is a man who I believe to be named Harvey Lakon, I don't know the spelling, formerly with the S.E.C., had lunch one day with Jack Aschkenasy. Aschkenasy took him into the firm and told him essentially the same things I just told you that were told to Marlow. And Mr. Lakon has told me that when he went into the firm there was a large blackboard with a picture of me hanging in effigy with the name Goldberg or something underneath that.

Q Is it your claim that my clients started any of those rumors or circulated them?

A Through the Sitomers, yes.

Q Is it your claim that my clients individually started or propogated any rumors, individually and personally?

A Up to May?

Q Up to May, '73.

A Not to my knowledge.

Q But your claim was that the Sitomer firm was doing it on behalf of my clients?

A Yes.

Q Do you know of any requests by my clients that the Sitomer firm circulate rumors about you?

A No.

Q Do you know of any agreement between my clients and the Sitomer firm that the Sitomer firm would circulate rumors about you?

A No.

Q What facts do you have to support your claim that the Sitomer firm was acting on behalf of my clients in allegedly initiating and circulating rumors?

A The original conspiracy to put out a fraudulent registration statement.

Q And you say part of that conspiracy was to defame you?

A I am saying that the conspiracy did not terminate at the point the registration statement was effected. And to the extend that my credibility would be an issue in the S.E.C. investigation and any subsequent lawsuits that would come out of that, that it was in the interest of the conspiracy to destroy my credibility and these things were done in furtherance of that.

Q My question is, do you have any facts to support an agreement or understanding between any of my clients and the Sitomer firm to defame you or to destroy your credibility?

A I have already answered that in the negative.

MR. TERRIGHT: We will take a luncheon recess at this point.

(Whereupon, at 1:00 o'clock p.m. a luncheon recess was taken.)

oOo

A Excuse me, except the one document I told you I don't have in my possession.

Q Which one is that?

A That is the student petition which is the last thing mentioned in Exhibit 27.

Q I see. So other than that student petition there is no other written notoriety concerning your case that you are aware of?

A You have what I have.

Q Is it your claim in this case that the written notoriety which we have marked as exhibits today resulted in damage to your reputation?

A Yes.

Q Do you claim the right to recover damages against my clients by reason of the injury to reputation which you claim resulted from the written notoriety which has been marked as exhibits this morning?

A Yes.

Q Is it your claim that any of my clients caused any of this written material,which has been marked as exhibits on this examination,to be published?

A I don't understand what you mean by "caused."

MR. BERGADANO: What do you mean by "to be published" as well?

MR. TERSIGNI: Let me take it a step at a time.

Q Do you claim that any of my clients published any of the material which you claim injured your reputation and which has been marked in this case?

A I think I should amend my previous answer to include the court proceedings which of course you have copies of.

I would include that as written notoriety that has hurt my reputation.

Q You claim a right to recover damages by reason of motions or proceedings --

MR. JAROSLAWICZ: I object to Mr. Goldberg giving any legal conclusion.

MR. TERSIGNI: I am asking him what his claim is.

MR. JAROSLAWICZ: He has told you what his claim is for loss of reputation.

Q Do you claim that you are entitled to claim damages on behalf of my client --

MR. JAROSLAWICZ: I object and direct him not to answer on the ground that it calls for a legal conclusion.

MR. TERSIGNI: I am asking him his claim.

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I will take it in the form of a representation from his counsel.

MR. JAROSLAWICZ: We claim that we are entitled to recover for loss of Mr. Goldberg's reputation which was brought about by criminal conspiracy by your clients and other defendants in this action.

MR. TERSIGNI: I want to know if the claim is made by Mr. Goldberg that he is entitled to recover and is seeking to recover damages by reason of proceedings taken by the court on behalf of my clients?

MR. JAROSLAWICZ: If those proceedings were the outgrowth of a criminal conspiracy and those proceedings engendered various proceedings which defamed Mr. Goldberg's reputation, then as a natural consequence of your --

MR. TERSIGNI: You are saying "if." I want to know if you do or you don't.

MR. JAROSLAWICZ: Yes, we do.

Q Is it your claim that proceedings taken on the part of my clients in this case were part of a criminal conspiracy?

A They were the outgrowth of it, normal conse-

stemming from it.

Q Do you claim that my firm was part of some conspiracy?

A No.

Q Do you claim that my firm acted without knowledge in the matter?

MR. JAROSLAWICZ: The claim is not being made.

MR. TERSIGNI: I am trying to find out what claim is being made.

MR. JAROSLAWICZ: I will stipulate that that claim is not being made. There is no claim being made against your firm.

Q Was there any notoriety concerning your case which to your knowledge appeared prior to the end of May, 1973?

MR. BERGADANO: Excuse me, when you say "appeared" are you talking about --

MR. TERSIGNI: Written publication, that is correct.

MR. BERGADANO: Or any matter?

MR. TERSIGNI: I am talking about any written document which has been marked as an exhibit this morning.

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A Yes, I am afraid that we don't have one of the exhibits though that we were referring to this morning. To that extent the list may not be complete. That is the Glacier amended prospectus.

Q Other than the Glacier amended prospectus, is there any other written notoriety which you claim occurred prior to the end of May 1973, and which injured your reputation?

A This is all after May, is it not?

Q I believe everything that has been marked as an exhibit here is after May, 1973.

MR. BERGADANO: When you say "as an exhibit here," you mean of the ones marked at the beginning of this session this afternoon?

MR. TERSIGNI: I am talking about 27 through 37-A, which I think are all of them. But I am referring to any written notoriety of which you have produced a group of documents which has been marked as exhibits in this case.

Q Do you claim that any of that was published prior to the end of May, 1973?

A Only the Glacier amended prospectus, which I believe was published prior.

Q When you say it was published, do you mean

it was filed with the Commission?

A No, sir.

Q What do you mean by that?

A I mean that it was distributed to some, as has been represented to me, 200 odd broker-dealers and I don't know how many thousands of potential shareholders.

Q Is it your claim that my clients distributed that prospectus or had anything to do with the distribution of that prospectus?

A I have no personal knowledge.

Q Do you have any information to that effect?

A I have no personal information.

Q Do you have any impersonal information?

MR. BERGADANO: I think you are playing games.

MR. TERSIGNI: The witness insists on qualifying his answers and I am trying to explore what he means by the qualification.

MR. JAROSLAWICZ: I will advise the witness that any information that was furnished him by counsel is privileged and does not have to be revealed.

MR. TERSIGNI: Wonderful.

Q Other than information that was provided to

you through any of your attorneys, do you have any information of any sort that has to do with anything concerning the publication of the Glacier prospectus?

A No.

MR. TERSIGNI: And I assume that if counsel has that information he will take the stand and give it to us?

MR. BERGADANO: I think that is an erroneous assumption.

Q Notwithstanding that all of the written notoriety that has been marked in our deposition was published after May of 1973, is it your testimony that nevertheless as of May, 1973 your reputation had been totally destroyed?

A You keep playing with the word "totally."

Q Substantially destroyed?

A Oh, yes, it was substantially destroyed.

Q Notwithstanding the fact that all of the documents which you have produced in support of your claim today were published afterwards?

MR. JAROSLAWICZ: Objection. Argumentative, but you can answer.

A Yes, it just simply continued the destruction and made it permanent.

MR. JAROSLAWICZ: Sort of a monument.

Q You say there were rumors that were circulat prior to May, 1973?

A Yes.

Q What was the substance of those rumors?

MR. BERGADANO: I think that was covered this morning.

MR. TERSIGNI: No, it was not.

Q Did they accuse you of disloyalty?

A I really don't think I can add anything to my morning's testimony on that.

Q With all due respect, I don't think there has been any testimony on the substance of the rumors. You have told us that you believe that the Sitomer firm was circulating rumors.

MR. BERGADANO: No, I am sorry, that is not what he said.

He said there were rumors and he traced one or two back to the Sitomer firm, but there were others.

Q He didn't tell us the substance of the rumors.

A There were three areas: the rumors regarding the grievance committee, which rumors were circulated long before I received any papers regarding any such

complaint; the rumors regarding the S.E.C. investigation and the rumors regarding my conduct while at the firm.

Q I am saying, what was the substance of these rumors?

A You mean what specifically was said?

Q Yes. What was the rumor?

A I don't know.

Q Was it that Mr. Goldberg was a crook?

A I don't know, Mr. Tersigni.

Q Was it that the S.E.C. is carrying on an investigation?

A Mr. Tersigni, the unfortunate fact of life about rumors is that people simply don't want to get involved in litigation like this. One person on my behalf gave me some advice, Mr. Abraham Pommerantz, and after your firm got finished with him he called me up and berated me for having involved him.

Unfortunately, attorneys simply have not come up to me and said, "Stu, we heard such and such from so and so."

Q How do you know that you have been defamed by these rumors?

A Through E. Daniel Shapiro, the dean of my law school.

Q What was said about you that you claim is

defamatory?

A Mr. Shapiro would call me into his office on a continual basis with something that he had heard in this meeting or something that he had heard at that luncheon or something that one of the board of trustees had mentioned to him, etcetera.

Q What was it that he was reporting to you? Was it that someone said you were incompetent or dishonest?

MR. JAROSLAWICZ: That was testified to this morning.

MR. TERSIGNI: No, it was not. I want to know what this witness's claim is.

MR. JAROSLAWICZ: Tell him again.

A All right. Dean Shapiro would ask me for a period of time, weeks before I ever received any communications from the grievance committee, and he would say, "Is there a disbarment proceeding against you?" And I would say, "Not to my knowledge." And he would say, "Well, you know, I heard that there was. So and so told me that there was something that has been filed against you." Someone had heard at such and such a place something regarding again the three subjects: the fact that a grievance committee complaint had been filed,

the fact that there was an S. E. C. investigation, where he would say to me, "Are you the target of the investigation? I heard from such and such a person that that was so." Or these rumors about my conduct that I did chase back to Harvey Lekon and a man that I have named for the record Marlow, that I can't be more precise on.

Q Did Dean Shapiro ever tell you that he had heard a rumor from the Sitomers or any of my clients about you?

A No.

Q Did he identify the source of any of the rumors that he had heard?

A No.

Q Do you know that whatever rumors he heard were initiated by sources other than the Sitomers or my clients?

A No.

Q You have no way of knowing who originated the rumors or what was said; isn't that so?

MR. JAROSLAWICZ: Objection.

Q Do you have any knowledge of what the rumors were?

A Not as to the dean.

Q Not as to the dean?

A No.

Q What other rumors did you hear about?

A The ones that came from Lekon and Marlow.

Q When did you hear about those rumors?

A At a luncheon with Harvey Lekon.

Q When?

A I don't know.

Q Was it after May, 1973?

A Yes.

Q It was after you say your reputation had already been destroyed?

A Yes.

Q What about the other gentleman you mentioned?

A Mr. Marlow?

Q Yes. What rumors did you hear from him?

A That the Sitomers had mentioned to him or that Allan Shapiro had mentioned to him, he was associated with the firm, that I had in essence perpetrated the misconduct and then went down to the S.E.C. to clear myself or sell the firm out to get myself off; somethin to that extent.

Q Do you recall his words?

A No, sir. I asked him to send me a letter, an

affidavit, anything. His response was, "I don't want to get involved."

Q Do you know what his address was?

A I don't even know his name. I am just using the name Marlow because it is the name that comes to my mind when I associate it with this, but I can't be more precise than that.

Q When did this conversation take place?

A After the papers were filed in the Meyerhofer case and his name was in them.

Q That was when the matter was before Judge MacMahon?

A Yes.

Q That is when you claim your reputation had already been destroyed?

A Yes.

Q What rumors did you hear before you say your reputation was destroyed that you claim destroyed it?

MR. BERGADANO: You say, "What rumors did you hear?" He didn't testify that he personally heard the rumors but that they were reported to him.

Q What rumors do you claim were circulating prior to the time you say your reputation was destroyed

in May, 1973?

A I have no additional information other than what I have given you this morning or this afternoon.

Q Are you aware of the substance of these rumors?

A I have no additional information other than what I have given you this morning or this afternoon.

Q Would it be fair to say that you don't have any knowledge of the substance of any such rumor?

MR. JAROSLAWICZ: Objection.

Q You may answer.

MR. JAROSLAWICZ: No, he may not answer.

MR. TERSIGNI: Why not?

MR. JAROSLAWICZ: It doesn't make any sense.

MR. TERSIGNI: I have asked him a perfectly legitimate question.

MR. JAROSLAWICZ: You are trying to summarize his testimony inaccurately.

Q Do you have any knowledge of the substance of any rumor that was circulating prior to the time you say your reputation was destroyed in May, 1973?

A I have no additional information from that which I have given you this morning and this afternoon.

Q Would you answer my question, Mr. Goldberg?

MR. JAROSLAWICZ: He has answered it. He doesn't have to answer countless times.

MR. TERSIGNI: The answer is yes or no, and I want an answer.

MR. JAROSLAWICZ: We are not going to sit and repeat the same thing without a ruling ad infinitum and ad nauseum. You have your information and to badger a witness is not the purpose of a deposition.

MR. TERSIGNI: Anything else, Mr. Jaroslawicz

MR. JAROSLAWICZ: Yes, but I will restrain myself.

MR. TERSIGNI: Thank God for that, any way.

Q Mr. Goldberg, tell me the substance of any specific rumor that you heard was circulating prior to May, 1973.

A I have no additional information from what I have given you this morning and this afternoon.

Q You haven't told me about any such rumor.

MR. BERGADANO: I have to object. I object both on behalf of the witness, myself and other counsel, because this is a sheer waste of time. You have now asked the same question at least six

times.

. You are not satisfied with the answer but he is not here to satisfy you.

MR. TERSIGNI: He has not answered the question:

MR. BERGADANO: That is your opinion. I must join in my co-counsel's observation that he has answered it.

MR. TERSIGNI: I would ask counsel to tell me what the answer was to that question.

MR. BERGADANO: I think you will find it in the record.

MR. TERSIGNI: I disagree and unless the witness answers the question I am putting you on notice now that we are going to go for a ruling.

MR. JAROSLAWICZ: I think that is an admirable way to proceed once we have a record.

MR. TERSIGNI: Do you have any other objection to my question which I can obviate for you other than that you claim it has been asked and answered?

MR. JAROSLAWICZ: Which question is this?

MR. TERSIGNI: I want to know the

substance of any rumor that Mr. Goldberg has claimed to have been circulated before 1973, which you claim he has already answered.

MR. JAROSLAWICZ: About four times.

MR. TERSIGNI: I want to know for when we go down to court, do you have any other objections to that question?

MR. JAROSLAWICZ: Not at present.

Q Do you have any knowledge of anyone ever having said about you, Mr. Goldberg, that you were dishonest?

MR. BERGADANO: You have already covered that several times.

MR. TERSIGNI: No, I haven't.

MR. BERGADANO: Yes, you have.

MR. TERSIGNI: I said "ever having said." We have been restricted to prior to May, 1973.

MR. BERGADANO: So you are asking now right up to the present moment?

MR. TERSIGNI: That's correct.

MR. BERGADANO: All right, go ahead.

A Yes.

Q Who?

A A very respected man in the community which I :

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will not be called before and badgered by you, a former Court of Appeals judge, Judge Froessel, a man in his eighties who is a former dean, I think, president of New York Law School. I believe his title now is dean emeritus of the board of trustees, a man who I said is in his mid eighties, has referred to me since the August 31 opinion as that "unethical attorney" in conversations that he has had with Dean Shapiro from time to time regarding my employment at the Law School.

Q You said since what opinion he has said that?

A Since the newspaper article which appeared on August 31, 1973 which is marked as SCG Exhibit 26 for identification.

Q And who reported this to you?

A Dean Shapiro.

Q What did Dean Shapiro say about it, if anything?

A He said that in the meeting that the board of trustees held before I started to teach, which was in the first few days of September of 1973, and that after the appearance of that article on August 31, that Judge Froessel had taken the position New York Law School simply couldn't afford to have a professor who had been found guilty of an ethics violation on the faculty of

the school.

Q Do you claim my clients are responsible for what Judge Froessel said?

A Yes, I claim that your clients are responsible for all of the adverse publicity I have received in this matter and the natural consequence of that adverse publicity.

Q All that adverse publicity has occurred since my firm filed on behalf of my client's --

MR. BERGADANO: I object.

Q Isn't it a fact that that publicity was publicized since my firm filed a motion on behalf of our clients before Judge MacMahon?

A What is the date?

Q We filed our motion on June 8, 1973.

A I have already testified some of the publicity took place before that date, have I not?

MR. BERGADANO: I object to the form of the question because it makes the implication of a statement of fact contrary to the witness's testimony.

Q Other than the Glacier prospectus, was there any written publicity concerning you prior to June 8, 1973?

MR. JAROSLAWICZ: See, Mr. Te[illegible], making a subtle shift between publicity and then inserting the word "written" when the witness is responding to your prior question, it is a fine way of cross examination but it is calculated to mislead the witness and I object to it.

Q Is there any publicity which you claim prior to June 8, 1973, other than the Glacier prospectus?

A I have nothing further to add to what I have already testified to today concerning that subject.

Q Other than Judge Froessel, do you have any knowledge or information of anyone else ever having said that you were dishonest or unethical?

A By specific name, no, but it has been related to me by Dean Shapiro that during the period of time from the time that newspaper article came out --

Q August 31, 1973?

A Yes, and the time that the reversal of that opinion was received by the Second Circuit, during the summer of 1974, there was a very concerted effort to have me removed from the faculty by the board of trustees, which efforts were regularly reported to me by Dean Shapiro and which created an extreme mental state of myself knowing that my job was in jeopardy almost every week I

was there for one entire year. And Dean Shapiro reported to me the various pressures that were being brought to bear on him. And he further stated that at one particular point he had to put his personal job as dean on the line in my behalf. But I don't have specific names to give you on that matter.

Q This all occurred subsequent to August 31, 1973 when Exhibit SCG-26 for identification was published; is that correct?

MR. JAROSLAWICZ: I am sorry, can I hear that, please.

(Question read.)

MR. JAROSLAWICZ: I object to the term "this all."

MR. TERSIGNI: Let the record show that Mr. Jaroslawicz and Mr. Bergadano were engaged in conversation during the witness's last rather lengthy answer, during which he described certain sentiments among the trustees apparently to remove him from his position at New York Law School, and I have asked him whether those events which he just finished describing occurred subsequent to the publication of Exhibit SCG-26 on August 31, 1973.

MR. BERGADANO: Mr. Tersigni, I have to point out to you, if I may, that you previously asked this witness questions this morning which led to his responses and the information that after the article of August 31, 1973 appeared there was a special meeting of the trustees of New York Law School at which Mr. Goldberg's appointment, continuation on the faculty of the school, although he had not yet started teaching, was the specific subject of the discussion.

You are fully aware of that, so I don't know the purpose of this continued inquiry into matters that you have previously covered at some length.

MR. TERSIGNI: The witness has just responded to my question by recounting certain events. I am now asking him whether those events occurred subsequent to August 31, 1973. I think I am entitled to do that and I want an answer.

MR. BERGADANO: You are not entitled to do it over and over again.

MR. TERSIGNI: I have not.

MR. BERGADANO: I think you have but I will let the witness answer one last time.

THE WITNESS: I stated on the record that certain things happened between August 31, 1973 and the summer of 1974 which is the period of time starting with this article and ending with the reversal on appeal. Don't you think it is ridiculous to ask me if those things happened after the article appeared when I specifically said that my testimony related to a time beginning with the article and ending with the reversal?

Q Mr. Goldberg, whatever you may think of my questions, all I want from you is an answer. My question to you at this point is, did the events which you have just finished describing transpire subsequent to August 31, 1973 when Exhibit 26 was published?

A The events which I testified transpired between the date of the article and the appeal did occur after the date of the article.

MR. BERGADANO: Off the record.

(Discussion off the record.)

Q Mr. Goldberg, you testified that you made attempts to obtain employment from January through the end of May, 1973, that you made application to various law firms; is that correct?

A No, sir.

Q It is not correct. Did you make any attempts to obtain legal employment during that period?

MR. BERGADANO: I assume legal employment means employment as a lawyer?

MR. TERSIGNI: Yes.

A Not during that entire period.

Q During what portion of that period did you make such an attempt?

A Around the end of March, April and May.

Q Did you make application to law firms?

A Yes, sir.

Q Do you recall to how many law firms you made application?

A It must have been one hundred.

Q Did you make application in writing?

A Yes, sir.

Q Did you do that in all instances?

A Yes, sir.

Q Did you write letters to all these firms?

A Yes, sir.

Q Was it a form letter?

A Yes, sir.

Q Do you have a copy of that?

A No, sir.

Q Did you retain a copy of it?

A Not past May of 1973.

Q Do you recall what the substance of that letter was?

A Yes.

Q Would you tell us?

A That I was looking for employment, briefly reciting my credentials, appending a copy of my resume.

Q In how many instances did you obtain an interview?

A I don't think I remember. I don't remember specific interviews based on specific letters.

Q Do you remember approximately how many interviews you had?

A No, sir.

Q Were there many interviews or a few?

A I don't know.

Q Was there at least one interview?

A Yes.

Q Could you say whether there were more than ten?

A No, sir, I couldn't say.

Q Do you recall the name of any firm to which

you applied?

A No, sir.

Q Not even one?

A No, sir.

Q Do you recall the name of any firm or any gentleman at any firm with whom you had an interview?

A No, sir.

Q Not even one?

A Not even one.

Q Do you recall the location of any of these firms?

A No, sir.

Q Can you tell me whether they were in New York or outside of New York?

A I believe they were almost all in New York.

Q Were there any so-called Wall Street firms?

A Yes.

Q You testified earlier that you drew certain inferences from certain questions that were asked of you.

A That is correct.

Q When those questions were asked of you, were you surprised?

A Not at all.

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Q Did you have any mental reaction at all to those questions?

A Yes.

Q What was the reaction?

A Sickness.

Q You were shocked?

A No, sir.

Q Angry?

A No, sir.

Q Upset?

A Yes, sir.

Q Do you recall the name of any person who asked you any of those questions?

A Nope.

Q And you don't recall the name of the firm --

MR. BERGADANO: You have covered that.

MR. TERSIGNI: No, I didn't cover that.

MR. BERGADANO: Yes, you did.

MR. TERSIGNI: No, I haven't.

Q You don't recall the name of the firm or of any person who asked you such a question?

A No, sir. This whole period of time of two months was so humiliating to me that I have just put them out of my mind.

Q But you remember the questions?

A Yes.

Q You haven't put those out of your mind?

A Oh, yes.

Q Do you remember the physical appearance of any of the people who asked you the questions?

A No, sir.

Q Were they men or women?

A I cannot remember.

Q You only remember the questions?

A The only thing I remember is that after proceeding on to four very successful positions and being sought after by law firms before this happened, I was in a position where I could hardly get into the front door of any firm. I must have applied to every firm that I ever heard of that does securities work.

I couldn't get in the front door and in those instances where I did, the interviews were so humiliating that I think the interviewer was as embarrassed as I was over the interview. And it quickly became apparent to me that it just simply was an exercise in masochism to go on interviews.

Q What caused you to believe that any particular interview was embarrassing?

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A There is simply no way that anyone could have offered me a job under those circumstances.

Q Did anyone express embarrassment to you?

MR. BERGADANO: You mean in any manner, like tone, look, the way they comported themselves?

MR. TERSIGNI: I am asking the witness. He said they were as embarrassed as he was and I am trying to find out the basis of the assumption.

A All I can remember is questions such as, "You mean you can't even tell us what the S.E.C. investigation involves? Are you involved in the S.E.C. investigation? Are they investigating you? Did you work on the registration statements that are being investigated?" Questions such as that. When I couldn't respond to any of these questions it became evident to me the total futility of going on an interview and not being able to tell an employer what was going on.

Q Is it your testimony that you were not able to respond to the question of whether you were being investigated?

A I cannot tell you specifically at this time the precise point that I had to cut questions off on an interview. All I can tell you is that I couldn't discuss

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the details of what was going on.

Q Do you recall being asked whether you were being investigated?

A I believe so.

Q And is it your testimony you were not able to respond to that question?

MR. BERGADANO: I object to your characterizing the testimony in view of all the testimony of this witness where he previously testified that because of the fact that there was an investigation he felt that he shouldn't, not that he physically couldn't, but he should not respond to such questions.

MR. ARNOFF: I strenuously object to Mr. Bergadano's characterization of the prior testimony in this case. I believe that this witness clearly this morning indicated that when he was discussing possible employment with prospective employers and he was queried about the Sitomer, Sitomer & Porges affair, he was unable to state to his employer whether he was in fact a subject of an S.E.C. investigation.

I think it is perfectly proper for Mr. Tersigni to query him upon this matter and lay

a foundation for whatever questions he deems appropriate. And I resent counsel attempting to coach the witness in the form of an explanation..

MR. TERSIGNI: Can I proceed with my examination?

MR. BERGADANO: No, I would like to proceed. I don't think you are accurate, Mr. Arnoff.

MR. ARNOFF: The record will speak for itself.

MR. BERGADANO: I don't like your characterization. I disagree with it and your remarks are inappropriate, unnecessary and incorrect.

Q When you were asked whether you were being investigated, Mr. Goldberg, what response, if any, did you give?

A I remember once being asked whether I was the target of the investigation, and I said, "No." Then the questions would become more general; "Well, if you are not the target of the investigation, are there any activities that you did while at the firm that are being investigated? Did you work on any of the statements that are being investigated?" I could not give you specific answers as to how I answered those questions. All I can tell you

is this. I could not respond fully. Whether it was on the third question or the fifth question that I had to cut off the discussion, I don't remember. I do clearly remember that very quickly on in the interview it got to the point that I could not respond to those questions and I remember a feeling of the interviewer looking at me as if he was saying to himself, "If you can't answer those, how can you possibly waste my time in applying for a job?"

Q Mr. Goldberg, in those instances when you were asked whether you were being investigated, you were able to respond, were you not?

A I cannot specifically remember a question being phrased the way you just phrased it.

When I was asked was I the target of the investigation, I was able to answer no, I was not. When I was asked whether or not any of the subject matter that I was working on in the firm was being investigated I think I answered yes, it was. At that point I had to refuse to answer further questions.

Q Why?

A Because I could not reveal everything I knew to a stranger.

Q Why?

A Because the matters were simply improper to be discussing with third parties.

Q You discussed them with the S.E.C., didn't you?

A Yes, sir.

Q You don't categorize the S.E.C. as "third-parties"?

A You are asking me if the S.E.C. is a third-party?

Q You said it is improper to discuss them with third-parties and my question is, do you include the S.E.C. in third-parties, as you have just used that term.

A As a party with whom it would be improper to discuss this with?

Q Yes.

A No, sir, I had an obligation to discuss it with the S.E.C.

Q When you said it would be improper to discuss them with third parties, did you have in mind the attorney-client privilege?

A Yes, sir, I had that in mind.

Q Were you ever asked by anyone during these interviews whether you had been guilty of any misconduct?

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A I don't remember that specific question.

Q Would you have been able to answer that?

A Yes.

MR. BERGADANO: Objection.

Q There was no prohibition to that?

A No.

MR. BERGADANO: Objection.

A I would have been able to say that I was not.

MR. DAVIS: That you were not what?

THE WITNESS: Guilty of any misconduct.

Q Did you volunteer that statement to any of your interviewers?

A I don't have a further recollection of what happened during those interviews than what I have already given you.

Q You have already testified that you felt you were at a disadvantage because you felt you couldn't discuss this matter.

A Yes.

Q But you have also testified that you feel that you would have been permitted to tell any of these interviewers that you had not committed any misconduct; is that right?

A Read that back.

(Question read.)

A Yes.

Q When they began questioning on other matters as to which you felt you could not speak, you felt that your chances of gaining employment were being seriously impaired; is that right?

A Yes.

Q There came a certain point in these conversations when you had to tell the interviewer that you could not discuss it further?

A Yes.

Q Is there any reason why you didn't point out, however, that you didn't commit any misconduct?

MR. JAROSLAWICZ: Objection. Argumentative.

MR. TERSIGNI: It is not argumentative.

MR. JAROSLAWICZ: "However"?

MR. TERSIGNI: Let me rephrase it.

Q Why did you not state at the point when you indicated that you could not discuss the matter further in detail that you yourself had not committed any misconduct?

A I don't recollect whether or not I did or did not say that.

Q You may have?

A I might have, yes. I certainly know I said that to Dean Shapiro.

Q Was he satisfied with that? Did he say he was satisfied with that?

A Yes.

Q After May, 1973, did you make any subsequent attempts to obtain a legal employment with any firm or other entity?

A No, sir.

MR. BERGADANO: Same definition of the words "legal employment"?

MR. TERSIGNI: Yes.

Q When I say "legal," Mr. Goldberg, I don't mean legal as opposed to illegal. I mean legal in the sense that you were seeking employment as a lawyer.

Was there any reason why you didn't seek legal employment after May, 1973?

A Yes.

Q What was that?

MR. BERGADANO: That has already been testified to but I will permit him to answer it.

MR. TERSIGNI: I don't think so.

MR. BERGADANO: I do. You asked him this morning.

A Up until June -- I am not sure of the date. When was the date of the reversal?

Q June 10, 1974.

A It wasn't May 10?

Q It was June 10, unless I am mistaken.

A Thank you.

Up until the point of time when the reversal came down I had an outstanding injunction against me and a brand of an unethical attorney.

Q You feel that Judge MacMahon's decision placed that brand on you?

A Yes.

Q Even though the decision stated that it was not challenging the good faith of the attorneys involved?

MR. BERGADANO: Whatever the statement was in the Judge's decision speaks for itself.

MR. TERSIGNI: I am trying to understand why this witness testifies that the decision branded him. He has already given that testimony and I am trying to understand his state of mind.

THE WITNESS: The front page of the NEW YORK LAW JOURNAL on August 31,1973, which is marked as SCG Exhibit 26 in --

MR. ARNOFF: Excuse me. I would ask counsel for this witness to instruct him to respond to the queries of the examiner. This is Mr. Tersigni's record at this point in time. I think this is obstreperous and I think counsel is perfectly entitled to inquire as to this witness's perception as to the damage that was caused to his reputation.

MR. JAROSLAWICZ: You may continue to answer.

(Discussion off the record.)

MR. JAROSLAWICZ: Mr. Goldberg, I would like you to be responsive to Mr. Tersigni's questions as best you can.

Q Mr. Goldberg, did you feel and do you feel that Judge MacMahon's decision branded you?

A Yes.

Q My question is, why did you construe the decision in that way in view of the Judge's statement and his opinion that he was not challenging the good faith of the attorneys involved?

MR. JAROSLAWICZ: Objection. Argumentative.

MR. TERSIGNI: I am exploring the witness's state of mind.

MR. JAROSLAWICZ: It is argumentative.

MR. TERSIGNI: It is not argumentative.

MR. JAROSLAWICZ: I will let him respond although I object.

Go ahead.

A Because it is the way the public interpreted the opinion. The headline the next few days is "Ethics Violation Found." I was the ethics violator in the article.

Q In the article?

A Yes, this is the way the press interpreted Judge MacMahon's opinion.

Q Do you claim my clients are responsible for the way the press interpreted Judge MacMahon's decision?

A Absolutely.

Q Is that your claim in this case?

MR. BERGADANO: Objection.

Q That is part of your claim in this case?

A Yes, sir, part of the claim.

Q I had asked you previously why you did not attempt to obtain legal employment subsequent to May, 1973, and you started to respond by referring to the period August, '73, to the reversal in June, '74.

A Yes?

Q Would you continue, please and explain why

you didn't seek legal employment?

A During what period of time?

Q At any time subsequent to May, '73 right up until the present.

A During the period of time from May to September I was under contract.

Q You were under what?

A Contract.

Q You mean to New York Law School?

A Yes. It was an oral contract until reduced to writing. I can't give you the specific date of my employment contract. I could not have sought employment from August, '73 to June, '74 because I was under a brand of an ethics violator and I certainly wouldn't apply to a firm based on that.

After that period of time I was involved, you involved me, in this federal action and by that time my reputation had simply been so thoroughly destroyed that I just consider it futile to even put myself through the humiliation of again attempting to seek employment after I have no reputation which to sell.

MR. DAVIS: May I have that answer read back?

(Answer read.)

(Whereupon, a brief recess was taken and the deposition resumed.)

Q Mr. Goldberg, is it your testimony that from August, 1973 when Judge MacMahon rendered his decision, and the August 31 LAW JOURNAL article appeared, up until June 10 when the Court of Appeals reversed that you were not in a practical position in order to seek legal employment?

MR. BERGADANO: June 10, 1974?

MR. TERSIGNI: Yes.

Q Subsequent to the Court of Appeal's decision on June 10, 1974, did you continue to believe that even subsequent to that date you were unable or not in a position to seek employment with a private firm?

A Yes.

Q What was that?

A Because by that time my reputation had been so thoroughly, irretrievably destroyed, I just don't think I could ever go back into private practice.

Q What happened between May, 1973 and June 10, 1974 that caused you to conclude that the situation had become irretrievable?

A Judge MacMahon's opinion.

Q Anything else?

A Yes, this great amount of publicity which is listed in Exhibit SCG-27.

Q So your testimony is that the situation as far as your reputation was concerned had become irretrievable as of June 10, 1974?

A Yes, and it continues to be damaged even further.

Q Now?

A Yes.

Q What has continued to damage it since June 10, 1974?

A An excellent example would be the NEW YORK UNIVERSITY LAW REVIEW article of October, 1974, which is in evidence as Exhibit SCG-33 in this EBT, which came out after the Second Circuit's reversal, which is probably one of the most damning articles that has come out so far against me.

Q That is an article from the NEW YORK UNIVERSITY LAW RÈVIEW; is that correct?

A Yes, written by the Sitomer's attorney.

MR. DAVIS: That was written by whom?

THE WITNESS: The Sitomer's attorney.

MR. BERGADANO: Not the current attorneys, not the firm that is representing them.

THE WITNESS: Not for this EBT, but their current attorneys.

MR. ARNOFF: Could we identify the names of the attorneys that Mr. Goldberg is referring to?

MR. JAROSLAWICZ: The name of the firm is Blank, Rome, Klauss & Komisky, Philadelphia.

MR. BERGADANO: If I may, the exhibit shows the specific author was Daniel K. Lipman. In the first footnote with an asterisk, he thanks his partners and associates in his law firm for their help in the preparation of the article and the names of a series of lawyers whom he gives those thanks to.

MR. WITNESS: One of whom, incidentally, is the attorney personally handling the Sitomer case, which is Mr. C. Cauley.

Q Do you claim Mr. Lipman wrote this LAW REVIEW article to injure you?

MR. JAROSLAWICZ: Was that the purpose or did the article injure him?

MR. [illegible]: Was that the purpose?

A I can't testify as to Mr. Lipman's purpose.

MR. BERGADANO: Or state of mind.

Q Do you claim that Mr. Lipman wrote that article on behalf of my clients or at my clients' request?

A Very indirectly, yes.

Q Waht do you mean by that?

A I mean that Mr. Lipman's firm is representing the Sitomers. The extent that he discredits a witness against the Sitomers is the extent to which he is advancing the interests of his client. And as I have previously stated to you, the Sitomer firm and your clients I believe to have been working together for the common purpose of perpetrating a securities fraud and for the necessary cover-up and discrediting that took place afterwards.

Q This article which is Exhibit SCG-33 for identification was written by Mr. Lipman in the NEW YORK UNIVERSITY LAW REVIEW, the issue dated October, 1974; correct?

A Yes.

Q That was approximately a year and a half after the commencement of the Meyerhofer action in 1972?

MR. JAROSLAWICZ: We will stipulate that.

the calendar reads.

MR. TERSIGNI: I appreciate the stipulation but I would like to put the question.

Q Is that right? Can we have an answer to that question?

MR. JAROSLAWICZ: Can you respond to that? It is approximately a year and a half from June of 1973 to October of 1974. You can respond to that.

Please respond to that.

A (Witness shakes his head negatively.)

MR. JAROSLAWICZ: We will stipulate to it.

MR. TERSIGNI: Let the record show that the witness declines to respond.

Q This article was also written approximately four months after the Court of Appeals decision in June, 1974; isn't that right?

MR. BERGADANO: We don't know when it was written. Are you talking about publication date?

MR. TERSIGNI: Yes.

MR. BERGADANO: Incidentally, as we all know, law reviews and other similar publications

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are not always issued for the month in which they are printed. Such as October may be issued in November or later, which is not uncommon, so the publication may be after October, 1974.

MR. TERSIGNI: That is very helpful. The article also appeared in the October, 1974 issue, which was months after the Court of Appeals decision in June of that year; isn't that right?

A October is after June.

Q And are you aware of the fact that at that time the Sitomer firm didn't represent Empire or any of my clients?

A In what capacity?

Q In any capacity.

A No, I think there was a continuing conspiracy. Now, if you want to play with the word "representing," do so.

MR. JAROSLAWICZ: I think Mr. Goldberg's point is well taken. Do you mean "represent" for the purpose of a registration, "represent" for the purpose of a conspiracy, "represent" for the purpose of this action?

MR. TERSIGNI: I have never heard it said by anyone, counsel, that a conspirator represents

somebody and I think when I ask a question whether or not a law firm represented my clients in October, '74 and the answer is, "What do you mean by "represent?" if there is anything frivilous I think it is the response that you just made.

Q Mr. Goldberg, do you know whether the Sitomer firm represented any of my clients as attorneys or in any other capacity when this LAW REVIEW article was writte[n]

A I don't know.

Q Do you have any information that they did?

A In any traditional attorney-client sense?

Q In any sense.

A Well, in the traditional attorney-client sense, if that is what you mean by "represent," no, I don't know whether they continued to represent them.

Q Is it your claim that this article was written as part of a conspiracy in 1974 to which my clients were a party?

A I don't really know if I can make the distinction between, as you put it, part of the conspiracy or furthering the ends of the conspiracy. I don't suggest that Mr. Lipman was part of any conspiracy or that the law firm was part of the conspiracy.

Q Well, Mr. Lipman is the author of this article,

Is that right?

A Yes.

Q Is it your claim that Mr. Lipman's purpose in writing the article was to injure your reputation?

A No.

Q Now, do you have any information that supports the fact that my clients supported either directly or indirectly the writing of this article by Mr. Lipman?

A No.

Q When you say that this article damaged your reputation, are you referring to the three footnotes which have been Xeroxed and made part of the Exhibit 33 for identification?

A Yes. Plus I have a notation that the footnote relating to page 111 also has some damaging material.

Q But it is those three footnotes in that article which you claim injured your reputation?

A Primarily, yes.

Q Is it your claim that you are entitled to receive money from my clients resulting from the damages resulting from this article written by Mr. Lipman?

A Yes.

Q Do you claim that Mr. Lipman is legally liable to you?

A You mean for damages?

Q In any way liable?

A I think he has definitely liabled me in unprivileg publication.

Q And he liabled you in footnote 9 by making comments about the decision in Meyerhofer against Empire Fire & Marine Insurance Company decided by the Second Circuit Court?

A I think that is terribly misreading of footnote 9. The first sentence says, "The author is aware of at least one instance in which a partner of the law firm apparently gained immunity from an S.E.C. enforcement action by outracing both his partners and his client to the Commission."

Now, immunity is granted against possible criminal prosecution and there is absolutely no question in my mind or in the mind of counsel that I have conferred with that that sentence is liable, per se. And when written by an attorney for an adverse party it is also strictly against the code of professional responsibility.

Q You are talking about Mr. Lipman?

A Yes, sir.

Q And your claim is that he violated the code

of professional responsibility?

A Without any question.

Q And you claim that my clients are responsible for that?

A Yes, sir.

Q What is the basis for that claim?

A There are two bases, one of which I have repeated from the very beginning; your clients in conjunction with the Sitomer firm involved me in fraudulent, illegal and possibly criminal acts. They deliberately, knowingly involved me in those acts. And the investigation that followed and all that happened to me, through Judge MacMahon's opinion, the court proceedings and all the publicity are the natural, expected, foreseeable consequenses when you involve somebody in fraudulent or criminal activity. This is the first basis. The second basis is that Mr. Lipman and his law firm are the agents and attorneys for the Sitomer firm and that Sitomer firm has very consistently sought to discredit me from the moment I went to the S.E.C. and of course it fits their purpose and the purpose of your client to make sure they discredit me as much as they can.

Q Anything else?

A No, sir.

Q What about footnote 111?

A In the text of the paragraph in which footnote 111 appears, the text starting at the last paragraph of page 460 and running over to page 461, the two sentences before footnote 111 state, "For example, even if a lawyer is justified in not disclosing his client's violation of the Securities Laws under the Code, he may nonetheless find himself named as a defendant in an S.E.C. civil enforcement action as an aider and abetter of the violation. Attorneys who come forward and reveal their clients' wrongdoing to the S.E.C. are more likely to be relieved of liability of any resulting S.E.C. sanctions."

Footnote 111 then reads "See Meyerhofer versus Empire," and it then gives the citation. So in the text of footnote 111 it states that an attorney may be an aider and abetter but that he may also be relieved of liability as an aider and abetter, which is pretty much the same as footnote 9 which refers to so-called "criminal immunity" that I may have received.

Q Are you mentioned by name?

A No, sir, but the reference is clearly ascertainable

by any attorney, which we can presume to be the persons reading this article, by a citation to Empire versus Meyerhofer.

Q What about footnote 117?

A Here again in footnote 117 one of the sentences in the footnote states, "Instead, the attorney subject to aider and abetter liability would be immunizing himself only from future possible prosecution by cooperation with the S.E.C."

So here in footnote 117 we again have the attorney as an aider and abetter, which is the same as footnote 111, immunizing himself, which is what we have in footnote 9.

Q Is it your understanding that the Securities and Exchange Commission can give immunity to an attorney?

A An attorney?

Q Yes.

A You mean as a witness?

Q Yes.

A Yes.

Q The S.E.C. has that power?

A If you are asking me for a legal opinion, I don't know whether or not the grant of immunity by the S.E.C. would have to be in conjunction with the Attorney

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to go back to her typewriter and type it up. That was it.

Q After you got the letter did you discuss it any further with her?

A No, it was sufficiently embarrassing as it was. I didn't wish to prolong it.

Q You have also produced Exhibit SCG-37A for identification, which is a litigation release released by the Securities and Exchange Commission.

A Yes.

Q Is it your claim that your reputation was damaged by the S.E.C.'s issuing this document?

A Yes.

Q Is it your claim that your client caused and asked the S.E.C. to issue this document?

A Caused, yes. Asked, no.

Q How did they cause?

A By involving me in a fraudulent activity, the natural consequence of which was an S.E.C. investigation.

Q How do you claim this document the S.E.C. issued damaged your reputation?

A Because in the last sentence it has my name mentioned and the name is mentioned in connection with a litigation release and the litigation release regards fraudulent

activity.

Q What does it say about you that you claim damaged your reputation?

A It says that I am an attorney formerly associated with the Sitomer, Sitomer, Porges firm.

Q Does it also say in substance that the existence of the matters involved in the litigation was brought to the Commission's attention by various people including you?

MR. JAROSLAWICZ: That by itself, that statement?

MR. TERSIGNI: Yes.

A Yes.

Q How did that injure your reputation?

A It allowed somebody to draw the inferences which were drawn in footnote 9 of the 1974 NEW YORK LAW REVIEW article.

Q That you were guaranteed immunity?

A Perhaps.

Q Do you believe the Commission should have worded this differently?

MR. JAROSLAWICZ: Objection. I direct the witness not to answer.

Q Did you ever discuss this release with

anyone at the Commission?

A No.

Q Do you believe the Commission was seeking to injure your reputation in issuing this release?

A No.

Q But you believe that was the result anyway?

A Yes.

Q You have also produced Exhibit 38 for identification which is a list of, I assume, your publications; is that right?

A Yes.

Q Have there been additional publications that you have authored since the time that this list was prepared?

A Yes.

Q How many such publications would you estimate there have been?

A I am not sure. I think one.

Q When was this list prepared, approximately?

A A year ago.

Q In or about September, 1974?

A About a year ago.

Q Have you made publications after June, 1974 when you have testified you felt that the damage to your

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reputation became irretrievable?

A Yes.

Q Have you found that your ability to publish has been impaired by the alleged injury which you say was irretrievable?

A Yes.

Q In what respect has it been hampered?

A The one publication that I have after that date, I believe it is only one, is a law review article in my law school's review, THE NEW YORK LAW FORUM. It is on the Freedom of Information Act. It was accepted for publication last week. It will appear some time in December.

During the last six months or so I have been putting together a casebook on professional responsibility from which I will be teaching next semester. I have not been able to get a publisher for that book. I have received extremely warm, cordial, friendly, telephone conversations, or I have had them with people and then something seems to happen. These warm conversations, with a preliminary indication of how happy they would be to publish a book, seem to evaporate and I finally get a letter stating that unfortunately they have just discovered that they have three other books under contract.

etcetera, and that they will not be able to publish mine.

Q Do you have correspondence to that effect?

A Oh, yes. Also I was seeking a grant, a research grant to do research in professional responsibility for the book, which I was not able to obtain.

Q Do you have any correspondence on that subject?

A Oh, yes.

Q I call for all of that correspondence.

MR. JAROSLAWICZ: We will take it under advisement.

Q Has there been any situation or instances in which a publisher or other person to whom you have made any kind of application either for a grant or for publication has raised any question about your reputation?

A Excuse me.

Oh, yes, there was one other publication that is not on this list. It was a publication, in a magazine, called LEARNING AND THE LAW. It is put out by the American Bar Association, I think, Committee on Legal Education.

Q Which has been published?

A Yes.

Q That was after the June decision in the Court of Appeals?

A I think so.

Q It was certainly after Judge MacMahon's decision?

A Oh, yes.

Q Has there been any instance where you sought to publish something or sought to obtain a grant or something similar to that where the person or entity to whom you applied expressed some concern about your reputation?

A Yes. I had spoken at a PLI conference on, I think, industrial revenue bonds, and I had edited a book for the New York Publishing Company on the -- I am not sure of the title. Oh, yes, I am: "Expanding Responsibilities Under the Securities Acts," regarding the National Student Marketing case and responsibility of an attorney to go to the Commission when his client has committed a fraud, etcetera. The publication date here is 1973. It was delivered to the publishers I believe in December, '72. I received a fee for the editing of this particular book. And at the time I was told that I, you know, the job was a really good

job and I was charging a very modest amount for services, that I would get more such contracts.

I expressed a very strong desire for them because it was a nice fee for me and I enjoyed the work. I have been told after that by a representative of the New York Law Publishing Company that there is simply no way that they could sell it.

Q Mr. Goldberg, my question was, have any of these publishers or other persons to whom you have applied raised any question with you regarding your reputation?

A Yes.

Q Which one?

A The New York Law Publishing Company.

Q Who there raised that question and what in substance did he say to you?

A Well, it was Dean Shapiro. He is the vice chairman of the board of trustees or board of editors, I don't know which one it is, of the NEW YORK LAW JOURNAL and also NEW YORK LAW PRESS. It is the same organization. He has stated that there is a, since I lost the article in the newspaper, there has simply been a reluctance on their part to publish anything that I may write.

Q Did he tell you that this reluctance [illegible] based upon any questions entertained about your reputation?

A Yes.

Q Did he refer specifically to your reputation?

A Yes, I think he used the specific word. I can't be absolutely sure he used that word. I am just not a sellable author for that purpose.

Q Whether you are sellable or not is not the question.

A That is his question because he represents the publishing company.

Q Did he tell you what questions specifically had been raised about your reputation?

A No.

Q He didn't tell you that anyone considered you to be dishonest or unethical or anything like that, did he?

A There is no necessity for the dean and I to have lengthy conversations on these matters. He just tells me that he can't get it for me because of what has happened and that is where the matter is dropped.

I don't question him on who said what and [illegible]

he say back to them.

Q You don't have any knowledge that anyone has expressed the view, that anyone said that you are dishonest and unethical?

A That is correct. I don't know who and what was said to Dean Shapiro from that source.

Q Was anything else said to you to call into question your reputation?

A I have already mentioned a telephone call between the S.E.C. and the board of trustees, have I not?

Q You mentioned it but you didn't say that anyone called your reputation into question.

A That was the purpose of the phone call.

Q What was said to you that called your reputation into question?

A That was the board of trustees meetings where they said they would have to get rid of me as a professor and Dean Shapiro took my defense of that. And eventually the way it was resolved, I don't know whether he made the suggestion or another member of the board made the suggestion, but the suggestion was let's --

Q Do you have any knowledge throughout that conversation of an indication that you were dishonest or unethical or anything along those lines?

A I have no knowledge of specific comments during that meeting.

Q Any other instances where you believe that there may have been some question about your reputation?

A I have no further recollection at this time.

Q So to the best of your knowledge you are unaware of anyone having said in words or substance that you are dishonest or unethical or anything in that connection?

A What time frame?

Q Any time frame.

A You want me to review all the testimony of today?

Q Let me limit it to August, 1973 to date.

A I have no further instances than what I have already testified to.

Q Okay. Have you since Judge MacMahon's decision published any articles or other material on the subject of legal ethics?

MR. JAROSLAWICZ: I object to the term "since Judge MacMahon's decision."

If you want to use a date I would be happy to let the witness answer.

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(Discussion off the record.)

THE WITNESS: I would just like the reporter to indicate on the record that I consider my statement to be part of this EBT and regardless of what instructions she receives from any other party or counsel, I don't want her notes that she is now preparing to be in any way released from her physical custody.

xx CONTINUED EXAMINATION

BY MR. TERSIGNI:

Q Mr. Goldberg, would you look at paragraph 44 of your amended answer, please. Do you have paragraph 44 in front of you now, Mr. Goldberg?

A Yes.

Q Do you see the reference in that paragraph to loss of employment in an amount of at least $16,875?

A Yes.

Q Can you tell us the basis on which the $16,875 is computed?

A Give me a moment. Yes, it represents my loss of employment for the period of time that I resigned from the firm on January 21, 1973 until I commenced employment with New York Law School on or about September 1, 1973, computed at a salary of either $25,[illegible]

per year or $27,500 per year, minus one check that I believe I might have received from the Sitomer firm in 1973, January.

MR. BERGADANO: Off the record.

(Discussion off the record.)

Q Mr. Goldberg, what was the basis for using in that computation the figure $25,000 or $27,500 as an annualized salary?

A My salary while at the Sitomer firm for the period of time of November 15, 1971 through, I believe, December of 1972 was, I believe, $25,052. I think that that figure appears in my employment contract which is an exhibit to my second affidavit.

In late December 1972, I was given a raise for the next year. I think the raise was to $27,500.

MR. TERSIGNI: Let the record show I am handing the witness Exhibits 39 and 40 for identification.

A Yes, in looking at Exhibit 39, I see that I received one check from the Sitomer firm which I believe to be for the first two weeks in January 1973 in the amount of $2,145.83. The complaint figure of $16,875 was a figure arrived at without any records, over a telephone conversation with my attorneys, which was based on . .

annualized income time I was out of work;ple[illegible], I believe, a figure of $2,000 was arbitrarily removed because I didn't recollect exactly how much I had received from the firm.

MR. ARNOFF: Could we have a copy of that check or could it be made an exhibit to the record?

MR. BERGADANO: The Sitomers have the check because it was cashed, deposited and--

MR. ARNOFF: I just want to get identification for my notes, that is all.

(Discussion off the record.)

Q Mr. Goldberg, are you able to state how much you claim presently you are entitled to recover for alleged loss of employment?

A Yes, sir, yes, I can do that for you. If we take $27,500, two-thirds of that, if my mathematics are correct here, are $18,232. And then I will take away $2,145.83, and I will amend the complaint from $16,875 to $16,187, assuming the mathematics check out.

MR. TERSIGNI: Off the record.

(Discussion off the record.)

Q Mr. Goldberg, are you able to tell me from Exhibits 39 and 40 how much your net income from all

sources was for the year 1972.

A Exhibit 40 and 39 has two figures on it. I have separated income from practice from royalty income. My net profit?

MR. BERGADANO: Net income. Well, the exhibit says net profit from 1972 from Schedule C, Line 21 is $15,652.61.

Q My question is can you tell me from your exhibit what your net income from all sources was?

MR. BERGADANO: Isn't that a matter of computation?

MR. TERSIGNI: Yes, it is. I just would like to agree on a number for the record.

MR. BERGADANO: You are talking on the basis of his income from his employment minus what he claimed as his business expenses and his income from royalties and other sources, against which he also charged straight business expenses. So they are two different items really.

MR. TERSIGNI: Yes, that is why I said from all sources.

MR. BERGADANO: I don't know that the two should be lumped together for that purpose. If you want to make a computation and you have got

copy of the document, you can make your own computation. I don't know that it is necessarily accurate to say that his income from his employment is the same and part and parcel of or that his royalty income is part and parcel of the income from his employment.

They are two separate sources of income. If you want me to read off the income from the exhibit, Tony, I will be glad to do it. As far as his income from Schedule C, he has shown his net profit at $ 15,652.61. As far as his royalty income from which he charged straight expenses he showed according to Exhibit 40, a net loss of $3,416 in that year.

Do you want the subsequent year?

MR. TERSIGNI: No.

Q Are you able to tell me what your net income from your employment as a lawyer was in 1972?

MR. BERGADANO: As opposed to one's writing? You mean as income from one's practicing law, as as opposed to one's writing?

MR. TERSIGNI: Yes.

A Yes, it was $ 15,652.61.

Q That was for a full 12-month calendar year?

A Yes.

Q Do I understand you correctly in this case that for a period of approximately seven months you are claiming $16,187?

A I think it is about seven and a half months.

Q Well, it is from January 22 to September 1.

A No, because the computation and two-thirds of $27,500 takes in January to August, inclusive. And then I am eliminating a check I received from the Sitomers for the first two weeks in January. So I think it is seven and a half months.

Q In computing your claim of $16,187, have you credited to the defendants any expenses that you would otherwise have had?

A No.

Q Do you claim that you are entitled to recover that amount without regard to expenses you would otherwise have incurred?

A Yes.

Q Are you able to tell me, Mr. Goldberg, what your net income from your employment as a law professor was in the calendar year 1974? If you don't know exactly, you may approximate it.

A I think that my salary--you see, there is an

overlapping. My employment contract now runs from September 1 to, I think, June 30. Or no, I think May 30. I think my employment contract is for a nine-month period but the first employment contract was for a 12-month period, so I have difficulty telling you. I can tell you what my three salaries were, though.

Q Recognizing the overlap, that your contract may not have been drawn on a calendar year basis, can you tell me with reasonable approximation how much you earned from your employment, as a law professor on a net basis during the year 1974?

A I would like not to speculate on the record. I would like to just say that my first contract was for $19,000, my second contract was for, I think $21,000 and my present contract is for, I believe, $23,500.

Q Can you approximate what expenses you had in 1974?

A As a law professor?

Q Yes.

A None.

Q What kind of expenses did you take into account in computing what you called net profit and I called net income on Exhibit 40 for identification?

A You want to know what my business expenses were?

Q What are the expenses referred to on that document in general?

A They would be for an office that I maintained and for expenses relating to the office.

Q Do you have any of those expenses currently?

MR. ARNOFF: Would you read that back, the question?

(Record read back.)

A I have currently given up my office. I don't maintain a separate office any longer. I have only the expenses that would be a portion of my apartment, which portion I attribute to the work that I do at home.

Q When did you give up that office?

A Beginning of this year.

Q So would I be correct in understanding that you maintained the office in 1973?

A Yes.

Q Did you maintain it during the seven and a half months for which you are making a claim in this case?

A Yes.

Q Have you credited any of those expenses against the amount for which you are suing?

A Are you referring to the $16,137?

Q Right.

A No.

Q Do you have any way of approximating what those expenses for the seven and a half month period for which you are claiming were?

A No.

Q Can you approximate it or state it on an annualized basis for the year 1973?

A No.

Q Had you been paid the $16,187 during the seven and a half month period in issue, that amount would have been reduced by the expenses you incurred during that period, would it not?

MR. BERGADANO: Objection, but you may answer it. The computation and the logic is a matter of the individual, not a matter of fact.

A I don't think I understand the question. I might just add for the record that the expenses I was incurring in the office were for extra business that I was bringing in.

Q Are you telling me that you did have income during the seven and a half month period which is in issue?

(Continued on next page)

A I want to take a look at the sheets. Yes, I think I did.

Q Can you approximate how much that income was?

A To the best of my knowledge, I think it was $ 3,000.

Q Have you credited that $3,000 against the amount that you are claiming in this case for that same period?

A No.

Q Mr. Goldberg, do you see the reference in paragraph 44 of your amended answer, to counsel fees in an amount which will exceed $15,000?

A Yes.

Q Are you able to tell me today how much you claim you are entitled to recover for counsel fees?

A Yes.

MR. BERGADANO: Excuse me, counsel fees during what period of time?

MR. TERSIGNI: I want to know any counsel fees that he claims he is entitled to recover.

MR. BERGADANO: You mean counsel fees that he would have received but for the occurrences which took place?

MR. TERSIGNI: No. Let me rephrase the question.

MR. BERGADANO: Are you talking about damages of counsel fees paid?

MR. TERSIGNI: No. Let me rephrase the question.

(Discussion off the record.)

Q I am simply asking this: How much do you claim you are entitled to recover for counsel fees?

MR. BERGADANO: That is my question counsel fees of what kind?

MR. TERSIGNI: Any kind.

MR. BERGADANO: Excuse me if I may complain myself, because Mr. Davis and I look at it from a different point of view.

Counsel fees that he paid or incurred or counsel fees that he would have received but for what occurred.

MR. TERSIGNI: Any counsel fees.

MR. BERGADANO: If you are talking about paragraph 44 and the last line of that paragraph on page 12 of the amended answer, you have already covered that.

MR. TERSIGNI: I haven't covered anything.

MR. BERGADANO: I am sorry, you did, and we already gave you the exhibits which you have showing the payment. And he testified that a portion of his

couns[illegible] fees paid and incurred was [illegible] to Mr. McKenna's firm for billable time for which they have not tendered a bill but for which [illegible] a moral obligation to pay in addition to those fees which he did pay.

Now, if you are talking about anything else, I would like it defined whether it is counsel fees paid or counsel fees which he would have received but didn't receive because of what occurred.

Q Mr. Goldberg, are you suing for counsel fees in this case?

MR. BERGADANO: Wait a minute. Again, this something which is ambiguous. Do you mean is he seeking to recover counsel fees that he has incurred for the prosecution of this, or counsel fees which he paid as a result of what occurred, or counsel fees which he would have received but for what occurred ?

Now, we have a tripple ambiguity. I would like it defined.

MR. ARNOFF: I would suggest to Mr. Bergadano with all due respect, we are not medieval philoso-phers whose appointed function is to obscure or [illegible]

quite clear and it is you who are the one who is obscuring the question and injecting the ambiguities.

MR. BERGADANO: You see, I am sorry. I have a simple mind and--

MR. TERSIGNI: I said I was going to finish in an hour, but I won't at this rate.

MR. BERGADANO: Since that has three possibilities, I would like to know which of the thre

MR. TERSIGNI: The problem with that, Mr. Bergadano is that I am not testifying. I am asking the witness to give me his testimony.

MR. BERGADANO: I am asking you to define what you are talking about when you say counsel fees.

Q Do you know what counsel fees are, Mr. Goldberg?

A Yes.

Q Do I have to define them for you?

A I can answer your question based on the last line of paragraph 44 which I think was the original question some time back. The amount of counsel fees that I have incurred in the defense, not the prosecution, of this action, and the action before the--

MR. BERGADANO: Even that is incorrect. I

am sorry.

MR. TERSIGNI: The witness may be wrong but he is entitled to give his testimony.

MR. BERGADANO: I am sorry. On the basis of the prior testimony, you know, because you have the testimony and you have the exhibits as to what he spent and incurred --

MR. TERSIGNI: I am asking a very simple question.

MR. BERGADANO:--As a result of the proceedings before Judge MacMahon and in the Court of Appeals and in the Supreme Court of the United States which is what you covered before and what you specifically related to paragraph 44.

Q Mr. Goldberg, are you suing my clients for counsel fees of any kind?

A Yes.

Q How much in dollars are you suing for with respect to counsel fees?

MR. BERGADANO: Tony--

(Discussion off the record.)

Q Let me rephrase the question so we can have a clear record. How much do you claim in dollars, Mr. Goldberg, you are entitled to recover from my clients

for counsel fees of any kind?

A The last line of paragraph 44, the counsel fees I have been required to incur, have been given to you yesterday, representing the checks that I have given to you. They are first, a check to Mr. Finkelstein on 1-21-73 for $1,500

MR. BERGADANO: Excuse me. Why don't you simply list the numbers of the exhibits rather than reading them all in again because it is just wasting time.

Q Are those the four checks which are marked Exhibit 41 for identification?

MR. BERGADANO: Plus the others.

MR. TERSIGNI: I said counsel fees.

(Discussion off the record.)

A The counsel fees which I am claiming for are the $1,500 to Mr. Finkelstein in Exhibit 41, the $1,000 to Mr. Finkelstein--

MR. BERGADANO: Part of Exhibit 41.

A -- the $1465.00paid to Mr. Finkelstein's law firm. These expenses were incurred in Mr. Finkelstein's representation of me. A check, also a part of Exhibit 41, for $2194.16to Mr. McKenna's firm. Exhibit 42 which is $216.54 which was the printing of the briefs on appeal. That comes down to $4,674 [illegible] plus a check paid to Mr. [illegible]

within the last two months. I don't believe I have received a copy back but the amount is approximately $600.

Q Which is not shown on Exhibit 41?

A No, I don't have the check back yet.

Q But the check you are referring to is not included?

A That is correct.

Q So that would make a fifth check in addition to the four marked as Exhibit 41?

A That would make a sixth check.

MR. BERGADANO: It would be a fifth check in 41. It would be a sixth check in 41 and 42.

A In addition to that, there is time billable to Mr. McKenna of approximately, for the appeal, $10,000 which I considered a moral obligation to pay him.

Q Are you suing my client for that also?

A Yes, I am.

Q Is there anything else in this category of damages which we have called counsel fees which you are suing my clients to recover?

A No.

Q The sums that you paid to Mr. Finkelstein and to the firm of Phillips, Nizer--

A That is Mr. Finkelstein's firm.

Q Which is Mr. Finkelstein's firm.

--were for legal services other than legal services in connection with the defense of this litigation--

MR. BERGADANO: Excuse me. Off the record.

(Discussion off the record.)

Q I am going to rephrase the pending question. Were the moneys that you paid to Mr. Finkelstein and his firm, Phillips, Nizer, for legal services other than legal services relating to this litigation? When I say "this litigation," I mean the Meyerhofer action and the Federman action.

MR. BERGADANO: Excuse me. If I may, really, seriously, this litigation insofar as Mr. Goldberg is concerned has two parts. One is that portion of the litigation in which he was involved --

MR. TERSIGNI: That was the Meyerhofer action.

MR. BERGADANO:--prior to the time that he was named as an additional defendant. And this litigation also includes from the time that he was named and served as an additional defendant.

MR. TERSIGNI: That is the Federman action.

MR. BERGADANO: For the record, I want that clarified.

Q But the thrust of my present question is this: Is it true that all of the counsel fees that you paid for Mr. Finkelstein and his firm, the firm of Phillips, Nizer, were for legal services other than legal services relating to any of the present litigation as defined by Mr. Bergadano?

A No.

Q Would you explain to what extent my understanding is inaccurate.

A There are two elements to Mr. Finkelstein's representation of me. I consider all of the fees paid to his firm to be in connection with this litigation as defined. There are two elements of which perhaps I should put on the record to be clear. I was originally named in the first action as a party-defendant. I consulted with Mr. Finkelstein regarding the service and the fact that I was named as a defendant in that action.

In addition, I regard all the fees that I paid to Mr. Finkelstein to be in connection with these actions because at the time I retained Mr. Finkelstein, these actions were clearly foreseeable to me.

Q The first check you paid to Mr. Finkelstein was on January 21, 1973?

A Yes.

Q What was the service that he was rendering to you at that time? Was that his representing you before the Commission or was he representing you in connection with any of the subsequent cases?

A I retained Mr. Finkelstein to protect my interests in the lawsuits that I knew would follow.

MR. BERGADANO: Let's take a two-minute break.

(A brief recess was taken at this point.)

Q Mr. Goldberg, I am going to try to expedite this and my next series of questions, hopefully, will accomplish that.

Do the sums which you are claiming for counsel fees include fees for services rendered to you prior to the commencement of either the Meyerhofer or Federman litigation?

A Yes.

Q Do they also include sums which you paid for counsel fees incurred by you in connection with the Meyerhofer litigation?

A To a smaller extent, yes.

Q Do they also include sums paid by you for legal services in connection with the appeal to the Second Circuit in the Meyerhofer action?

A Yes.

Q Beyond the appeal, to the petition for certiorari in the petition that was filed in the Meyerhofer action?

A Yes.

Q Do they also include legal services rendered to you in connection with your having been named an additional defendant in the Federman action?

A Yes.

Q Do they include services rendered to you up to date in the Federman action?

MR. BERGADANO: Not all services. There is no inclusion in that computation for fees charged or paid to my firm, nor is there any computation in there for fees, whatever moneys may have been paid to Mr. J lien's office or any other law office other than Mr. McKenna's firm; is that correct?

THE WITNESS: Yes.

Q But you are including fees which you have paid to Mr. McKenna's law firm--

MR. BERGADANO: Which is Wormser, Kiely.

Q --in connection with your defense as an additional defendant in this litigation right up to date; is that right?

A Yes.

(Discussion off the record.)

Q Mr. Goldberg, in general form, I have attempted to categorize the various categories of legal expense that you have had. Are you able to approximate the number of dollars that you claim for legal fees in connection with each one of those general categories that we have discussed?

A Yes. The fees paid to Mr. Finkelstein were fees that were substantially all paid and incurred prior to the commencement of the Meyerhofer, which I think was on or about May 2.

Q I think it was May 2 or 3 of 1973.

A The Bar Press bill for $216.54--

Q Before you get to that, can you approximate the amount of the fees which you just referred to?

A Yes, $3,965. That is the total fees paid to Mr. Finkelstein, all but maybe $100 or $200 of which would have been incurred prior to the initiation of the Meyerhofer action.

Q Go ahead.

A The Bar Press bill of $216.54 was a printing bill for the appeals brief to the Second Circuit. The $10,000 some odd dollars which figure will be made, I hope, exact by the end of this week or I should say today,

was incurred by Mr. McKenna in the appeal to the Second Circuit and later to the United States Supreme Court. The fee to Mr. McKenna of $2,491.10 and the additional amount of $600 some odd, which amount shall be clarified, I hope, today--I have asked Mr. McKenna to call me up around four o'clock and tell me those figures--were incurred partially as regards him representing me in the Federman case, and I believe he--I am not sure whether he performed other services for me such as the grievance committee.

I am not sure of that.

(Discussion off the record.)

MR. TERSIGNI: We are going to leave a blank in the transcript and at the request of counsel, I should like to ask Mr. Goldberg, when he executes the transcript, to determine whether any of the legal fees for which he is suing, as you have just explained, related to your representation related to the matter before the grievance committee and if so, would you be good enough to supply a number in the blank that is left representing that portion of the fees.

THE WITNESS: Let me just make a statement now that I am sure it would be really insubstantial.

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MR. BERGADANO: You mean that the amount of the fees would be insubstantial, not the statement.

MR. TERSIGNI: I understand that.

THE WITNESS: Mr. Finkelstein was the attorney of the record in that case and he didn't charge me for those services.

Q If, for any reason, your recollection is changed, you will have an opportunity to put in a number, and if not, you can so indicate that there is no change in your testimony.

A ____.

Q Mr. Goldberg, other than the $850,000 which you have discussed in your testimony which is referred to in your complaint, and the $16,187 which we have discussed this afternoon, and the legal fees which we have just finished discussing, are you suing my client for any other sums of money?

A Yes, I am.

Q Are these sums of money other than things which are referred to in your complaint?

A Yes, they are.

Q What is that?

MR. BERGADANO: When you say "complaint," are you talking about--

Q In your amended answer.

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PLTF EXBT SCG 26 for ident. 9/17/75 I. LESSER

~~DEFT EXBT~~

New York Law Journal

OFFICIAL DAILY LAW NEWSPAPER DESIGNATED PURSUANT TO THE JUDICIARY LAW

NEW YORK, FRIDAY, AUGUST 31, 1973

Lawyer, Firm Cited in U.S. Court

Ethics Violations Found In Securities Offering

By S. James Rosenfeld

A New York attorney and a law firm have been found by Federal Judge Lloyd F. MacMahon of the Southern District of New York to have violated Canons 4 and 9 of the Code of Professional Responsibility. Canon 4 provides that "a lawyer should preserve the confidence and secrets of a client"; Canon 9 provides that a "lawyer should avoid even the appearance of professional impropriety."

The court's order, issued Aug. 23, enjoined Charles Stuart Goldberg and the firm of Bernson, Hoenizer, Freitag & Abbey, of 1 East 44th Street, "from acting as counsel or participating in any way with counsel for the plaintiffs in this action or in any future action against Empire (Fire and Marine Insurance Company) involving the same transactions, occurrences, events, allegations, facts or issues, and they are further enjoined from disclosing confidential information regarding Empire to others except to comply with rulings of the court on discovery proceedings or upon trial." *Meyerhofer v. Empire Fire and Marine Insurance Co.*, 73 Civ. 1910-LFM.

Mr. Goldberg's attorney and the Bernson firm have said they intend to appeal Judge MacMahon's ruling.

The court's ruling came on cross motions: Plaintiffs had moved under Rule 56 for an order declaring its suit a class action; defendants had moved for an order which would, among other things, disqualify plaintiffs' attorneys from representing plaintiffs in this action or associating with any other attorney in the prosecution of the action, and enjoin plaintiffs, their attorneys, and Mr. Goldberg from "further disclosing confidential information regarding Empire. . . ."

The underlying suit alleged that Empire's registration statement violated the federal securities laws because it omitted compensation agreements between Empire and its counsel, Sitomer, Sitomer & Porges, with whom Mr. Goldberg was then associated as a limited partner. According to the court's opinion, Mr. Goldberg "was actively involved in the preparation of the statement or in the necessary background work, such as, reviewing the minutes of Empire."

Early in January, 1973, according to the court, Mr. Goldberg became aware of "what he felt were material omissions concerning certain compensation agreements between the Sitomer firm and

(Continued on page 5, column 1)

Ruling on Ethics

(Continued)

Empire. Evidently, the possibility that these agreements would become public was the subject of much discussion within the Sitomer firm."

SEC Official Contacted

Feeling that "full disclosure to the Securities and Exchange Commission was proper and obligatory," Mr. Goldberg had his personal attorney contact Stanley Sporken, Deputy Director of the SEC's Division of Enforcement to "explain the nature of the problem and make known Goldberg's availability to meet with the SEC to discuss the problem," Judge MacMahon said.

A meeting with the SEC was set up for Jan. 22. The night before, Mr. Goldberg sent telegrams to two limited partners in the Sitomer firm telling them he was resigning and of his meeting with the SEC "for the purpose of making full and complete disclosure regarding the activities of the firm in regards to securities practice," Judge MacMahon said.

The SEC meetings resulted in an affidavit being submitted by Mr. Goldberg on Jan. 26, 1973. "No member of the firm participated in or appeared at these discussions notwithstanding their present claims that they intended to make full disclosure," the court said. The compensation agreement was first publicly disclosed in Empire's annual report, Form 10-K, filed with the SEC on April 12, 1973, and sent to Empire stockholders on or before April 30, 1973.

On May 2, plaintiffs filed their lawsuit, serving the Sitomer firm and its general partners. Plaintiffs' counsel telephoned Mr. Goldberg the following day, telling him that the action had been filed and that Mr. Goldberg named as a defendant. According to the court: "Goldberg denied any wrongdoing and told counsel of his efforts to have the Sitomer firm make disclosure before the SEC. Counsel agreed that if Goldberg were not involved in the alleged omissions, they would move to drop Goldberg as a party defendant."

Subsequently, two meetings were arranged between Mr. Goldberg and plaintiffs' counsel so that Goldberg could be shown the complaint without being served, it was said. At both meetings, plaintiffs' counsel asked for a copy of Mr. Goldberg's affidavit to the SEC. Mr. Goldberg was said to have refused until William P. Sullivan, special counsel to the enforcement division, "stated that the SEC had no objection to disclosure of the affidavit."

Thereafter, plaintiffs' counsel successfully moved for an order dropping Mr. Goldberg as a named defendant.

Canon Explained

Judge MacMahon said that, in reviewing charges of unethical conduct against attorneys, "courts may not rely upon the good faith of the attorneys involved, but rather must apply 'a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.' *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973)."

The Canon 4 obligation of a lawyer to preserve his client's confidences, the court said, "is broader than the evidentiary attorney-client privilege and 'exists without regard to the nature or source of information or the fact that others share the knowledge.' Furthermore, the court does not stop to inquire whether any information which Goldberg or his firm may have disclosed to plaintiffs' counsel was in fact confidential, for such an inquiry would reveal the very confidences sought to be protected. All that need be shown, therefore, is that during the attorney-client relationship Goldberg had access to his client's information relevant to the issues here."

The court found that Mr. Goldberg had access to the client material at issue and that "there can be no question that he has associated with, and made disclosures to, the plaintiffs without the consent of Empire. The mere association compromises the confidences which Canon 4 seeks to protect." The court also found that Goldberg's "association with the former client's adversary gives the appearance of impropriety" however innocent it may have been.

Nor were plaintiffs' counsel able to "disentangle themselves from the tainted association," the court

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said. "They agreed to meet with Goldberg and were willing, if not eager, listeners to disclosures of confidences which they knew, or should have known, were protected by the Canons of Professional Responsibility. They, thus, not only encouraged but also participated in a violation of Canon 4 and Canon 9."

Judge MacMahon also rejected an argument that Mr. Goldberg was required to reveal the information because, if true, it constituted a continuing criminal and civil violation of the securities laws.

Judge MacMahon also rejected an argument that Mr. Goldberg was required by Disciplinary Rule 7-102 (B) (1) to reveal the information because, if true, it constituted a continuing criminal and civil violation of the securities laws. Noting that Mr. Goldberg gave his affidavit to the SEC in January, 1973, that the information was disclosed by Empire in its annual report in April of that year, and that the complaint in the instant suit was "thus filed on the basis of information already public," the court said:

"Disciplinary Rule 7-102 (B) (1) requires the lawyer to reveal the fraud only if the client refuses to do so. Since the client had already revealed the omission to its stockholders and to the public, via the SEC, Goldberg had no further obligation (under the Rule) to reveal the information or to discuss the matter with plaintiffs' counsel."

The court specifically refrained from considering the propriety of Mr. Goldberg's disclosures to the SEC.

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Goldberg

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(Partial Listing)

Loss of Reputation

Aug. 31, '73	NYLJ p.1 "Ethics Violations....."
Sept. 10, '73	NYLJ p.1 "10 Appointed To The Faculty....."
Oct. 24, '73	NYLJ p.1 SEC Complaint
	WSJ p.14 " " [SCG not mentioned]
Oct. 26, '73	NYLJ p.1 "Whistle-Blower"
June 28, '74	WSJ "Lawyer Cleared" [see [?]]
July 29, '74	NY mag. p.28 "acquitted on appeal"
Oct '74	NYU L Rev 49/437 F5, text F11, F17
Mar '75	Duke L Rev 1975/121
	SEC Litigation Release
1973	Lions In The Street pp 159, 223 "whistle-blowing lawyer"
Dec 12, '74	Olliphant letter
Spring '75	Student Petition re Prof. Goldberg & Prof [illegible]

Ex. SCG 27 for I.D.
on 7/17/75

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Ex. SCG 28 for I.D.

Lions in the Street

The Inside Story of the Great Wall Street Law Firms

Paul Hoffman

A SIGNET BOOK
NEW AMERICAN LIBRARY
TIMES MIRROR

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STREETS.

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Finally, there is *Meyerhoffer* v. *Empire Fire & Marine Insurance Company*, which shows that the S.E.C.'s new standards by no means have won universal acceptance. In *Meyerhoffer*, an attorney acted exactly as the S.E.C. had urged, precisely the opposite of Epley—he blew the whistle, both on his law firm and on his clients. But instead of being hailed as a hero, he was held to have violated the Canons of Ethics.

Stewart Charles Goldberg was a "limited partner" of a small midtown firm, Sitomer, Sitomer & Porges, which was counsel to Empire Fire & Marine Insurance Company on an offering of 500,000 shares. In addition to its fee of $15,000, Sitomer was given the option of buying Empire stock at $2.05 a share and reselling it in the public offering at $16. This was not disclosed in the prospectus.

Goldberg first became aware of the arrangement while working on a similar offering involving Glacier General Assurance Company. In Empire, the firm's profits were about $200,000; with Glacier, they would have been $900,000. Apparently unable to persuade his superiors that the matter required public disclosure, Goldberg resigned from the firm, retained counsel—Burton Finkelstein of Phillips Nizer—and went to the S.E.C.

As a result, the commission blocked the Glacier offering and started an investigation of the Sitomer firm. (It has since filed suit to enjoin the lawyers.) When the Empire arrangement was made public, a stockholder's class action was filed against the company to recover the windfall profit. Portions of the record are still sealed, but apparently Judge Lloyd F. McMahon reprimanded Goldberg for violating client-counsel confidentiality by going to the S.E.C. The commission, in turn, was forced to intervene with an *amicus curiae* brief, apparently in support of the whistle-blowing lawyer.

The case poses the problem for any securities lawyer in a similar dilemma: *National Student Marketing* says he's damned if he doesn't disclose; *Meyerhoffer*, that he's damned if he does. Until the issue is resolved—and resolved in the S.E.C.'s favor—it seems likely that perplexed lawyers will pursue the path of Epley, not that of Goldberg.

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Ex. SCG 29 for I.D.

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THE UNBUNDLING OF HIGHER EDUCATION — William K.S. Wang

THE PROPOSED CABLE COMMUNICATIONS ACT OF 1975: A RECOMMENDATION FOR COMPREHENSIVE REGULATION

THE DUTIES AND OBLIGATIONS OF THE SECURITIES LAWYER: THE BEGINNING OF A NEW STANDARD FOR THE LEGAL PROFESSION?

THE EFFECT OF ERRORS AND CHANGES IN THE DEBTOR'S NAME ON ARTICLE NINE SECURITY INTERESTS

THE EMERGING BIFURCATED STANDARD FOR CLASSIFICATIONS BASED ON SEX

UNITED STATES v. CBS: WHEN SKETCH ARTISTS ARE ALLOWED IN THE COURTROOM, CAN PHOTOGRAPHERS BE FAR BEHIND?

BOOK REVIEW — Kazimierz Grzybowski

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THE DUTIES AND OBLIGATIONS OF THE SECURITIES LAWYER: THE BEGINNING OF A NEW STANDARD FOR THE LEGAL PROFESSION?

Stuart Charles Goldberg, a young lawyer, had specialized in securities work. During 1972, Goldberg assisted in preparing the prospectus for a public offering to be made by his firm's client, Empire Fire and Marine Insurance Company. While in the process of drafting the prospectus, Goldberg became troubled by the lack of disclosure that was being made of certain facts; he felt that there should be full and complete revelation of these matters whereas the law firm and Empire disagreed. Finally, Goldberg chose to resign from the firm because of this controversy. He immediately appeared before the Securities and Exchange Commission (SEC), where he fully disclosed all aspects of his disagreement with his client. Later, when buyers of the issued stock included Goldberg as a defendant in a securities suit brought against Empire, he handed the affidavit which he had given to the SEC, and which was presumably highly damaging to his former client, to the plaintiff's attorney.[1]

Some lawyers and law students may find the conduct of Goldberg surprising, even shocking. Anyone, however, who has followed developments in the federal securities law area for the past several years should not be surprised in the least by Goldberg's acts, for despite the damaging revelation of matters confidentially communicated to him as a lawyer by his client, he was only obeying the recent demands made by the SEC upon attorneys caught in similar difficult situations. The increasing pressure brought to bear upon lawyers by the SEC to disclose possible securities law violations by their clients and the reaction of this young lawyer represent only a segment of the increasing duties and liabilities now placed upon attorneys specializing in securities law. This Note will explore the present obligations of the securities lawyer and contrast them with the traditional role of the attorney. Then, it will discuss the possible implications this trend may have upon *all* lawyers, not just those specializing in securities work, and will examine the benefits and problems offered by this stiff new standard.

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1. The case is Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3274 (U.S. Nov. 11, 1974).

The Traditional Framework

The lawyer in the past has been seen fundamentally as an advocate whose primary duty is to fully and adequately represent his client. This notion of the lawyer as advocate has had fundamental effects upon what have been seen as his duties and responsibilities.

The Attorney-Client Privilege

The relationship of an attorney and his client is such that the attorney cannot be forced to disclose information confidentially communicated to him by his client.[2] This privilege, which is the oldest of the testimonial privileges,[3] obviously entails a potential detriment to justice, since it may prevent full disclosure of all facts touching upon a controversy;[4] however, it is felt that whatever harm may be caused by the attorney-client privilege is outweighed by the beneficial effect it has upon the attorney-client relationship.[5] Although the justification for the privilege when it first arose in the 16th century was that a man of honor such as a lawyer would never break a confidence,[6] the reasoning behind it quickly shifted to the promotion of free communication between lawyer and client, a necessity if our advocacy system of law is to be successful.[7] As one court has stated:

> The doctrine [of the attorney-client privilege] is based on public policy. While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer.[8]

In other words, a lawyer can only adequately represent and advise his client if the client feels safe to disclose all relevant, even damaging, information; our legal system finds this to be so important that the at-

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2. For a general discussion of the attorney-client privilege, see C. McCormick, Handbook of the Law of Evidence §§ 87-97 (2d ed. E. Cleary 1972).

3. 8 J. Wigmore, Evidence § 2290 (McNaughten rev. 1961).

4. *See, e.g.*, C. McCormick, *supra* note 2, § 87.

5. For a strong argument in favor of the attorney-client privilege, see 8 J. Wigmore, *supra* note 4, § 2291.

6. D. Mellinkoff, The Conscience of a Lawyer 138 (1973). *See also* 8 J. Wigmore, *supra* note 4, § 2290.

7. D. Mellinkoff, *supra* note 6, at 137-38; 8 J. Wigmore, *supra* note 4, § 2291.

8. Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960).

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torney-client privilege is recognized in order to promote free and total communication between attorney and client.

The attorney-client privilege is not without limits, however. Most importantly, the privilege does not protect the communications of a client and attorney when the client seeks advice in carrying out an illegal or fraudulent scheme.[9] This exception goes as far back as 1884, when the Queen's Bench decided the now-famous case of *Queen v. Cox*.[10] The court there justified its decision by stating that such communications do not come within the scope of professional employment.[11] This result was reached because "it cannot be the solicitor's business to further any criminal object."[12] A more straightforward explanation is that the attorney-client privilege was created to promote the administration of justice and that it would be a mockery of such policy to allow the privilege to further the implementation of criminal or fraudulent schemes.[13] At any rate, today it is well settled that an attorney must testify concerning such communications.[14]

Legal Ethics

The Code of Professional Responsibility of the American Bar Association[15] reveals an underlying assumption that the lawyer owes his primary allegiance to his client.[16] Canon Four, for example, states, "A Lawyer Should Preserve the Confidences and Secrets of a Client."[17] Ethical Consideration (EC) 4-1 under that Canon goes on to state that this requirement is compelled both by the fiduciary duty owed to a client by the lawyer and by the need to preserve professional confidences necessary for the proper functioning of the legal system.[18] Further,

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9. C. McCormick, *supra* note 2, § 95; 8 J. Wigmore, *supra* note 4, §§ 2298-99.

10. 14 Q.B.D. 153 (1884).

11. *Id.* at 167.

12. *Id.* at 168.

13. *See, e.g.*, C. McCormick, *supra* note 2, § 95.

14. *See, e.g.*, United States v. Shewfelt, 455 F.2d 836 (9th Cir. 1972); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970); United States v. Bob, 106 F.2d 37 (2d Cir. 1939).

15. ABA Code of Professional Responsibility (1969).

16. *See, e.g.*, Lowenfels, *Expanding Public Responsibilities of Securities Lawyers: An Analysis of the New Trend in Standard of Care and Priorities of Duties*, 74 Colum. L. Rev. 412, 418 (1974).

17. ABA Code of Professional Responsibility Canon 4 (1969).

18. *Id.* EC 4-1. EC 4-1 emphasizes the preservation of confidences for much the same reasons which justify the attorney-client privilege. EC 4-1 reads in full as follows:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a

this ethical standard is broader than the attorney-client privilege, for it exists without regard to the nature or source of the information and regardless of who else shares it.[19] It is unethical for a lawyer to use such confidences to the disadvantage of the client or for his own advantage,[20] and the obligation of silence continues even after the termination of a professional relationship.[21] Canon Seven directs that "[a] Lawyer Should Represent a Client Zealously Within the Bounds of the Law."[22] A lawyer owes this duty both to his client and to the legal system as a whole.[23] Moreover, a lawyer must not let other interests or people affect his judgments made for his client.[24] "Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."[25]

Competing considerations may require, or at least allow, the lawyer to take action that harms his client. For instance, if legal authority exists which is directly opposed to the position taken by his client in a judicial proceeding and opposing counsel fails to inform the tribunal of its existence, the lawyer should voluntarily disclose such authority.[26] Disciplinary Rule 4-101(C) states, "A lawyer may reveal: . . . (3) The intention of his client to commit a crime and the information necessary to prevent the crime."[27] Interestingly, the rule says "may reveal," thus implying that the lawyer has no affirmative ethical duty to make such disclosure.[28] Disciplinary Rule 7-102(B), however, is mandatory in its language. It provides:

> A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the

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lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance. (Footnotes omitted).

19. *Id.* EC 4-4.
20. *Id.* EC 4-5.
21. *Id.* EC 4-6.
22. *Id.* Canon 7.
23. *Id.* EC 7-1.
24. *Id.* Canon 5.
25. *Id.* EC 5-1.
26. *Id.* EC 7-23.
27. *Id.* DR 4-101.
28. *But see* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 314 (1967).

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fraud to the affected person or tribunal.[29]

In its whole, the Code of Professional Responsibility seems to accept the idea that the lawyer is primarily responsible to his client; indeed, it places great ethical duties upon the lawyer to insure that the loyalty of the lawyer flows to the client and that the lawyer does not harm the client. While the attorney does have several other competing considerations which can create difficult situations for him, the duty to the client in general appears strongest. Several ABA Opinions illustrate the difficult decisions a lawyer at times must make. For example, prior to trial a client flees, forfeiting bond; the court issues a warrant for his arrest. Subsequently, the client's family informs his lawyer of his whereabouts. Does the lawyer have an ethical duty to convey this information to the authorities?[30] The ABA Committee on Professional Ethics thought not.[31] Another possible dilemma for an attorney arises when he knows that his client has a criminal record yet hears either his client or the court clerk tell the judge the contrary. The ABA Committee has stated that if the lawyer learned of the record from the client, he has no duty of disclosure.[32] The committee reasoned as follows:

> We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty . . . involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.[33]

In both opinions cited, policy arguments could be made to force the lawyer to reveal confidential items to the detriment of his client; the duties and responsibilities of the attorney to his client are so strong, however, that such policies were outweighed.[34]

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29. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(b) (1969) (footnote omitted).

30. In the actual case, the lawyer chose not to reveal the information; rather he found the client and advised him to return and surrender, which he eventually did. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 23 (1967).

31. *See id. But see id.* No. 155.

32. *Id.* No. 287. Even if the lawyer learned of the record from an outside source he could remain silent if he felt the court was not relying upon him. If he decided he was being relied upon, his duty then would not be to disclose his knowledge but to resign from the case. *Id.*

33. *Id.* at 637.

34. In this same context, see the assertions of Dean Monroe Freedman that a lawyer must not reveal the confidences of his client, even when the client is thereby able to deceive the court. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). Dean Freedman's

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Malpractice Liability

The theory that a lawyer owes primary loyalty only to his client also is reflected in the malpractice law. If a lawyer's professional negligence harms his client, the client of course can sue for malpractice and be compensated for his injuries. A lawyer's mistakes, however, can injure a wide range of persons beyond his client. Yet this group of third persons cannot hold the lawyer liable; rather, it has long been recognized that a lawyer is liable only to his client for negligent practice of the law, regardless of the harm done others.[35] As the Supreme Court stated many years ago, "[T]he general rule is that the obligation of the attorney is to his client and not to a third party."[36]

Summary

The result of all these various factors has been to maximize in the minds of both lawyers and laymen the role of the attorney as advocate for his client and to minimize whatever duty he owes to the public. Indeed, the popular conception of the lawyer is far closer to a tireless fighter for his client's interests, regardless of what they may be, than to an independent officer of the court, prepared to sacrifice his client should the client seek improper gains. An extreme example of this feeling is shown by one commentator who begins by stating that a lawyer's "loyalty runs to his client. He has no other master."[37] Continuing, this commentator asserts that "[t]he more good faith and loyalty the lawyer owes to his client, the less he owes to others when he is acting for his client."[38] A more moderate and appealing statement concerning the advocacy role of the lawyer was made, ironically (considering its later views), by the SEC in 1962: "Though owing a public responsibility, an attorney in acting as the client's advisor, defender, advocate

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article prompted strong dissent. *See, e.g.*, Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966). For a recent discussion of a similar subject by Dean Freedman, see Freedman, *Legal Ethics*, N.Y.L.J., July 24, 1974, at 1, wherein he asserts that a lawyer has a duty to go forward with a case even when he knows that the client has perjured himself.

35. *See, e.g.*, Sachs v. Levy, 216 F. Supp. 44, 46 (E.D. Pa. 1963) (mere negligence of attorney to someone other than his client is not actionable); Sterling v. Jones, 249 So. 2d 334, 337-38 (La. App. 1971) (wrongful withdrawal of pleadings not actionable by third parties); Bryan & Amidei v. Law, 435 S.W.2d 587 (Tex. Civ. App. 1968) ("For such injuries . . . as third persons may sustain by reason of the failure or neglect of the attorney to perform a duty which he owed to his client only, they have no right of action against the attorney." *Id.* at 593).

36. Savings Bank v. Ward, 100 U.S. 195, 200 (1879).

37. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

38. *Id.* at 5-6.

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and confidant enters into a personal relationship in which his principal concern is with the interests and rights of his client."[39] This statement probably comes extremely close to what most lawyers (and their clients) have traditionally seen as their role. That is, while recognizing a certain amount of responsibility to the public, they predominately have seen themselves as protecting and representing the rights of their clients.

The Lawyer's Expanding Role in Securities Law

The traditional (and rather comfortable) view of the role of the lawyer discussed above has been called into question in the securities area, where a vast expansion, actual or potential, of the duties and obligations of the securities lawyer has left specialists in that field bewildered by what function they should play.

Of course, the lawyer, like everyone else, has always been liable under the federal securities laws where he engaged in active fraud.[40] However, it traditionally has been assumed that lawyers cannot be held liable as lawyers under those acts; that is, the mere fact of failure by a lawyer to prevent his client from breaking the federal securities laws does not render the lawyer himself guilty. As Justice William O. Douglas (while Commissioner of the SEC) stated in 1935, "[T]he long tentacles of the [federal securities laws] do not reach that far."[41] Forty years later, one cannot be quite so certain.[42]

Public Offering Liability

An example of this expansion of liability can be seen in the area of the law concerning registration statements required to be filed by the issuer in a public offering. Such registration statements, and other offering documents, are prepared almost totally by lawyers with the aid of experts such as accountants. Section 11 of the Securities Act of 1933[43] concerns liability for material misstatements or omissions in effective registration statements. Section 11(a) lists five classes of per-

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39. *In re* American Fin. Co., 40 S.E.C. 1043 (1962).

40. *See, e.g.*, SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972); United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964). *See also* Kamel, *Attorneys' Securities Laws Liabilities*, 27 Bus. Law. 1153, 1156 (1972).

41. Douglas, *The Lawyers and the Federal Securities Act*, 3 Duke B. Ass'n J. 66, 69 (1935).

42. *Cf.* Isaacs, *Liability of the Lawyer for Bad Advice*, 24 Calif. L. Rev. 39, 45-47 (1935) (where the author presciently predicted that the securities laws would in time result in wider attorney liability).

43. 15 U.S.C. § 77k (1970).

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sons liable for such mistakes.[44] While lawyers are not mentioned by name in any of these classes, subsection 4 allows suit against anyone who has been named with his consent as having prepared or certified any part of the registration statement, his liability being limited to such segment as purports to have been prepared or certified by him. However, lawyers have shied away from being named as experts who prepared the statement (although in fact it may have been totally written by them), and it long was assumed that lawyers were not included among those liable for misstatements or omissions in registration statements. Today securities lawyers cannot feel so secure.

The landmark case in this area was *Escott v. Barchris Construction Corp.*,[45] where the buyers of debentures brought a class action under section 11 against the corporate issuer, underwriters, auditors, and signers of the registration statement for false statements and material omissions in the prospectus.[46] Several lawyers had signed the statement as directors and therefore were included as defendants. Birnbaum was house counsel for the corporation and also its secretary and new director; he had signed an amendment to the prospectus. The court held him liable for lack of due diligence in examining the document. Specific mention was made of his status as attorney: "As a lawyer, he should have known his obligations under the statute."[47] However, the "obligations" referred to seem clearly to be those created by signing the document and not those arising from his role as lawyer for the issuer. The only significance of Birnbaum's status as a lawyer was that it totally precluded him from asserting as a defense a lack of awareness as to what was required of him under the Securities Act, a defense which would have been doubtful even if put forth by a layman.

More provocative was *Barchris'* handling of the case against defendant Grant. Grant, also an attorney, was an outside director of the issuer; his law firm represented the issuer in its securities matters, and Grant had done a great deal of legal work in preparing the offering. The court made it clear that Grant was being sued solely as a director and signer of the prospectus and not as a lawyer.[48] However, the court

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44. The five categories of persons listed in section 11(a) are as follows: 1. signers of the registration statement; 2. directors; 3. persons who consented to be named in the prospectus as about to become a director; 4. persons named as having prepared or certified part of the statement; 5. the underwriter. *Id.*

45. 283 F. Supp. 643 (S.D.N.Y. 1968).

46. *Id.* at 652. The prospectus was part of an effective registration statement, thus section 11 was applicable. *Id.* at 655.

47. *Id.* at 687.

48. *Id.* at 690.

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placed great emphasis upon the role Grant played as a lawyer in the offering:

> [I]n considering Grant's due diligence defenses, the unique position which he occupied cannot be disregarded. As the director most directly concerned with writing the registration statement and assuring its accuracy, more was required of him in the way of reasonable investigation than could fairly be expected of a director who had no connection with this work.[49]

It could be argued that this statement only has relevance to the securities lawyer who also serves as director. However, other portions of the opinion seemed aimed directly at Grant as a lawyer. For example, the court stated:

> It is claimed that a lawyer is entitled to rely on the statements of his client and that to require him to verify their accuracy would set an unreasonably high standard. This is too broad a generalization. . . . Even honest clients can make mistakes. . . . The way to prevent mistakes is to test oral information by checking the original written record.[50]

This requirement of verifying the accuracy of the client's statements would seem just as applicable to one who serves purely as attorney as to the lawyer who is also a director.

In *SEC v. Frank*,[51] a case decided a few months before *Barchris*, the SEC had obtained an injunction under section 17 of the Securities Act of 1933[52] and section 10(b) of the Securities Exchange Act of 1934[53] prohibiting a lawyer from drafting any misleading documents after the trial court had found that an offering circular drafted by him was misleading.[54] On appeal, the Second Circuit had these tantalizing remarks to make concerning a lawyer's duty when assisting in an offering of securities:

> [A] lawyer, no more than others, can escape liability for fraud by closing his eyes to what he saw and could readily understand. . . . *Whether the fraud sections go beyond this and require a lawyer passing on an offering circular to run down possible infirmities in his client's story of which he has been put on notice, and if so what efforts are required of him, is a closer question* on which it is important that the court be seized of the precise facts, including the extent . . . to which

49. *Id.*
50. *Id.*
51. 388 F.2d 486 (2d Cir. 1968).
52. 15 U.S.C. § 77q (1970).
53. *Id.* § 78j(b).
54. Since an effective registration statement was not involved, section 11 was not applicable. However, the case does concern the lawyer's duty when preparing documents involved in a public offering.

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his role went beyond a lawyer's normal one.[55]

The court remanded the case for further proceedings to obtain evidence concerning the lawyer's knowledge; thus the court never answered the question it raised concerning the responsibility of a securities lawyer to go beyond the words of his client and make an independent investigation into their truth.

Barchris and *Frank* both leave open as many questions as they answer. The exact responsibilities of a lawyer representing a corporation issuing securities remain uncertain. SEC Commissioner A.A. Sommer, Jr. has asserted that had Grant in *Barchris* been sued in his capacity as a lawyer under Rule 10b-5, the court would have reached the same result for the same reasons.[56] This conclusion appears speculative. Nonetheless, it must be admitted that *Barchris* and *Frank* could form the basis for a decision by a future court holding a lawyer who had prepared a registration statement or other offering document liable on the basis that although he had no knowledge of fraud, he had failed to make a full investigation of everything his client had told him. Thus, securities lawyers today are in the position of not knowing precisely what their duties are in such situations, but they must realize that on some future day in court, their past acts may be judged by such a standard.

Liability Under the Anti-Fraud Provisions

Under the general anti-fraud provisions it was at one time assumed that lawyers would not be held liable *qua* lawyers. It is true that a lawyer could always be held an aider and abettor because of his representation of a client who violated the securities law. However, most lawyers have assumed that in order for a lawyer to be held liable as an aider and abettor of a fraudulent scheme, it was necessary for a lawyer to have knowledge of the scheme.[57] In effect, this meant that if one were part of the scheme, he would be held liable; nevertheless, the mere fact of failure to prevent a client's fraudulent scheme was not a violation of the law.

Today, lack of awareness of the fraudulent scheme may not save an unwitting lawyer whose legal skills were used by the client to aid in the success of the fraud. In *SEC v. Spectrum, Ltd.*,[58] the SEC

55. 388 F.2d at 489 (emphasis added).

56. Sommer, *The Emerging Responsibilities of the Securities Lawyer*, [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,631 (Jan. 24, 1974).

57. *See* SEC v. National Bankers Life Ins. Co., 324 F. Supp. 189 (N.D. Tex.), *aff'd*, 448 F.2d 652 (5th Cir. 1971).

58. [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,300 (2d Cir. 1973).

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sought an injunction against twelve defendants, including an attorney, charged with violations of section 17 of the Securities Act of 1933[59] and section 10(b) of the Securities Exchange Act of 1934.[60] The case concerned a fraudulent scheme to sell to the public unregistered stock of Spectrum; the defendant attorney had given an opinion letter stating that the stock did not need to be registered, which act the SEC charged made him an aider and abettor of securities law violations. The district court refused to grant the injunction against the attorney, finding that he had no knowledge of the attempted fraud, which it felt was needed to prove a defendant guilty of aiding and abetting.[61] The Second Circuit reversed, observing that proof of actual knowledge is not required in such cases; rather, the court held that a negligence standard should be used.

> We do not believe . . . that imposition of a negligence standard with respect to the conduct of a secondary participant is overly strict . . . . [T]he smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters.[62]

Thus, the court held that a lawyer whose negligence permits a fraudulent scheme to succeed is susceptible to an injunctive action brought by the SEC.[63]

The Second Circuit specifically noted in *Spectrum* that its decision did not reach the question of whether a lawyer's negligence could render him liable as an aider and abettor in a criminal or private damage action. However, a recent private suit brought against accountants would seem to imply that such liability could be applicable to attorneys. *Hochfelder v. Ernst & Ernst*[64] involved a private cause of action brought against the accounting firm of Ernst & Ernst, which had acted as accountants for a brokerage firm that had violated Rule 10b-5. Plaintiffs charged that "Ernst & Ernst was negligent in auditing First Securities thereby aiding and abetting the Rule 10b-5 violation."[65] The Seventh Circuit stated that "admittedly it [Ernst & Ernst] had no knowledge

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59. 15 U.S.C. § 77q(a) (1970).

60. *Id.* § 78j(b).

61. *See* SEC v. Spectrum, Ltd., [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,631, at 92,867-68 (S.D.N.Y. 1972).

62. [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,300, at 94,970.

63. For an argument that negligence should not be the basis of an action based on aiding and abetting, see Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Identification, and Contribution*, 120 U. Pa. L. Rev. 597, 630-38 (1972). *Cf.* United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964).

64. CCH Fed. Sec. L. Rep. ¶ 94,781 (7th Cir., Aug. 30, 1974).

65. *Id.* at 96,578.

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of the fraudulent escrow scheme."[66] For this reason, the trial court had granted Ernst & Ernst summary judgment. The circuit court, however, reversed, finding that a lack of knowledge of the fraud was not fatal to a private cause of action for aiding and abetting. In holding that Ernst & Ernst's negligence alone could render it liable as an aider and abettor, the court stressed that Ernst & Ernst had breached a duty of inquiry.[67] Admittedly, accountants historically have been seen as possessing a much greater duty of independent inquiry than have lawyers. However, the case seems to make more likely the eventual application of a *Spectrum*-type decision in the arena of causes of action for private damages.

Should the negligence standard be imported into the law concerning whether a lawyer is the aider and abettor of his client's violation of the anti-fraud provisions in the federal securities law, the essential question will be how far the theory can be pushed. Presumably, whenever a person who has followed legal advice given by an honest lawyer violates the securities laws, the lawyer either gave poor legal counsel or was not fully aware of what his client's scheme involved. The question is whether in either case the lawyer's failure to give correct legal advice or to use due diligence in investigating his client is sufficient to cause him to be an aider and abettor of his client's fraud. Suppose a client asks a lawyer to issue an opinion letter stating that certain privately issued stock could be resold. Although the lawyer honestly feels that the law would allow such resale, he would realize that if he were mistaken, a securities violation would occur. If the lawyer goes ahead and issues the opinion letter and is mistaken as to his view of the law or the facts, should he be personally liable as an aider and abettor of the violation?[68] If the answer is yes, then it would seem that a securities lawyer would be an aider and abettor whenever he gives mistaken advice which leads to a securities violation.

The fear of every securities lawyer would seem to be that the theory of *Black & Co. v. Nova-Tech, Inc.*[69] will find its way into this area of the federal securities laws. That case, although decided by a federal district court, concerned the Oregon Blue Sky Law. The interesting issue faced was whether a lawyer and his law firm were "participants" in the alleged securities fraud, as required by the relevant stat-

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66. *Id.* at 96,579.
67. *Id.*
68. This is the factual background of Mariash v. Morrill, [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,557 (2d Cir., May 10, 1974). No decision on the merits of the case has yet been reached.
69. 333 F. Supp. 468 (D. Ore. 1971).

ute and as alleged by the plaintiffs, purchasers of unregistered securities. First, the court held the lawyer to be a participant. He had prepared the legal papers for the sale, and therefore the sale could not have occurred without him. Next, the court noted that the law firm was named as corporate counsel in the issuer's annual reports. Since these reports were used as promotion for the sale, the law firm was rendered a participant in the sale.[70] *Black* would seem to say that whenever a lawyer represents a client who commits a securities fraud, the lawyer participates in that fraud.

The importance of lawyers' becoming liable under the federal securities laws for damages for their good-faith acts as lawyers should not be minimized. Beyond the obvious personal and professional embarrassment which such liability would entail for the lawyer, damages under the securities law in general, and most notably under Rule 10b-5 in particular, can be huge.[71] The lawyer's liability would be joint and several with the other defendants held in violation of the securities law. If the corporation involved should be unsound financially and if its insiders should determine that their best interests would be served by leaving the jurisdiction of the court, the lawyer could well turn out to be the only defendant left to satisfy a huge damage claim. This potential for the placing of draconian liability upon the attorney has raised "the question of commensurability between the degree of harm to the investing public and the sanction imposed upon the lawyer."[72] Further, not only can the individual lawyer be sued but also his law firm.[73] Since potential liability in securities cases can literally rise to hundreds of millions of dollars,[74] the spectre is raised not only of the

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70. *Id.* at 472.

71. *See, e.g.*, Bradford, *Rule 10b-5: The Search for a Limiting Doctrine*, 19 BUFFALO L. REV. 205 (1970); Ruder, Texas Gulf Sulphur—*The Second Round: Privity and State of Mind in 10b-5 Purchase and Sale Cases*, 63 NW. U.L. REV. 423 (1968); Note, *Rule 10b-5: The Rejection of the Birnbaum Doctrine by* Eason v. General Motors Acceptance Corp. *and the Need for a New Limitation on Damages*, 1974 DUKE L.J. 610; Note, *The Role of Scienter and the Need to Limit Damages in Rule 10b-5 Actions*, 59 KY. L.J. 891 (1971).

72. Comment, *SEC Disciplinary Rules and the Federal Securities Laws: The Regulation, Role and Responsibilities of the Attorney*, 1972 DUKE L.J. 969, 1022.

73. *See, e.g.*, SEC v. National Student Marketing Corp., [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,360 (D.D.C., complaint filed Feb. 3, 1972), where two distinguished law firms were named as defendants in an SEC complaint asking for injunctions against securities law violations.

74. The *Texas Gulf Sulphur* litigation is illustrative. The facts of the *Texas Gulf Sulphur* (TGS) cases are as follows: TGS made an incredibly rich strike of ore in Canada, which had become apparent by November 12, 1963, when the first test drilling was completed. For a period of five months the results of this and other tests were withheld from the public, but, during this same period insiders, aware of the discovery, purchased TGS stock and calls. On April 12, 1964, TGS issued a somewhat pessimistic press re-

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bankruptcy of individual lawyers but also of whole law firms.

It is also interesting to note that if *Spectrum* were to be applied to private damage actions, the traditional notion that a lawyer is not liable to third parties would be changed.[75] By calling the lawyer's negligence an aiding and abetting of securities fraud rather than malpractice, any member of the public falling within the protection of the anti-fraud provisions could hold the lawyer liable for the harm the lawyer's negligence caused.

SEC Administrative Sanctions

The only formal method of controlling lawyers' conduct possessed by the SEC is by way of Rule 2(e),[76] which allows the SEC to suspend a lawyer's right "of appearing or practicing before it in any way."[77] Before the 1960's, this power was almost never exercised; during the 1960's, the rule was increasingly employed. Then in 1970, the rule was revamped in order to make it a more effective tool in influencing attorney conduct.[78] The 1970 amendments[79] involved three major changes in Rule 2(e). First, the SEC can suspend any lawyer it finds to have aided or abetted the violation of a federal securities law.[80]

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lease intended to quash rumors about the strike. It was not until April 16, 1964, that TGS made an official public announcement revealing the true nature of the discovery. These events resulted in suits brought under Rule 10b-5, based alternatively on either non-disclosure of material facts from November 12th to April 16th or on plaintiffs' reliance on the misleading press release. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 843-47 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The amount of TGS's potential liability resulting from these cases was tremendous. Professor Ruder estimates that if rescission were used as the measure of damages (including loss of future profits which would have been made) and relief given from November 12th to April 16th, damages would have amounted to over $390,000,000; this sum would have been $150,000,000 more than TGS's net worth. Ruder, *supra* note 71, at 428-29. Another writer calculates that if the Utah District Court's formula of damages in Reynolds v. Texas Gulf Sulphur Co., 309 F. Supp. 548 (D. Utah 1970), *aff'd in part and rev'd in part sub nom.* Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (based on the value the stock reached during a reasonable period after the full announcement), were to be multiplied by the number of shares traded during the eleven trading days following the April 12th press release, damages for that period alone would equal $30,978,551—or about 23% of total shareholder equity. Note, *The Role of Scienter*, *supra* note 71, at 909-10. Eighty-one New York cases were settled for $2,700,000; TGS has deposited this amount in escrow in two funds. In the first, $2,200,000 was set aside for claims based on reliance upon the press release; $500,000 was placed in the second fund for claims based on non-disclosure during testing. Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 308, 310-11 (S.D.N.Y. 1972).

75. *See* notes 35-36 *supra* and accompanying text.

76. 17 C.F.R. § 201.2(e)(1) (1974).

77. *Id.*

78. *See* Comment, *supra* note 72, at 982-85.

79. *See generally* 35 Fed. Reg. 15,440 (1970).

80. 17 C.F.R. § 201.2(e)(1)(iii) (1974). This is quite important because a con-

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Second, if a lawyer should be disbarred, that likewise is grounds for Rule 2(e) suspension.[81] Finally, if a lawyer is permanently enjoined from violating securities laws, he can be suspended from SEC practice.[82] The effect of the 1970 amendments is to facilitate swift action against any lawyer appearing before the SEC. Since any securities lawyer's livelihood depends on his being able to practice before the Commission, Rule 2(e) provides a potent means by which the SEC can control lawyers and shape their conduct. The SEC has become more active in its use of Rule 2(e) in recent years, even using it against lawyers whose acts were not clearly violative of the securities laws.[83]

Recently, the SEC has proposed a new amendment to Rule 2(e). Proposed Rule 2(e)(7) provides that all proceedings under Rule 2 (e) must be public unless the Commission otherwise directs.[84] If this proposal becomes effective, the SEC would have a powerful sword to hold over all securities lawyers' heads. As Commissioner Sommer has stated, it is difficult for a securities lawyer ever to regain his professional standing once he has been publicly accused of improprieties.[85] Just the threat of public hearings under Rule 2(e) undoubtedly frightens most securities lawyers. The ABA has opposed adoption of Proposed Rule 2(e)(7), stating that, among other things, the threat of public hearings impinges upon the independence of the bar. "The potential of a public proceeding is likely to cause apprehension among members of the Bar that too vigorous controversy with the staff is unwise because it could lead to a staff recommendation for public 2(e) proceedings."[86]

Even if the public hearing requirement is never adopted, Rule 2 (e) will remain a powerful stimulus to the lawyer to follow the wishes

viction for violation of the securities laws does not mean automatic disbarment. *See In re* Richardson, 15 Cal. 2d 536, 102 P.2d 1076 (1940) (conviction of violation of section 17 was held not to be prima facie proof of moral turpitude).

81. 17 C.F.R. § 201.2(e)(2) (1974).

82. *Id.* § 201.2(e)(3)(i).

83. *See, e.g., In re* Murray A. Kivitz, Securities Act Release No. 5163 (June 29, 1971), [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,144, where a lawyer was suspended from practicing before the SEC for two years for allowing an intermediary to act between his client and him, thereby aiding someone to function improperly before the Commission. Subsequently, the decision was reversed by the District of Columbia Circuit Court of Appeals, which found no substantial evidence supporting the SEC decision. Kivitz v. SEC, 475 F.2d 956 (D.C. Cir. 1973).

84. Proposed Rule 2(e)(7) may be found at 248 BNA Sec. Reg. & L. Rep. B-1 (Apr. 10, 1974).

85. Sommer, *supra* note 56, at 83,692.

86. Comments of the ABA Committee on Federal Regulations of Securities on the Proposed Amendments to Rule 2(e)(7) of the Commission's Rules of Practice, 258 BNA Sec. Reg. & L. Rep. F-1, F-3 (June 26, 1974).

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of the SEC. It also represents one more danger faced by the securities lawyer today that was unimportant ten years ago.[87]

SEC Views of the Role of the Securities Lawyer

The SEC and its Commissioners have in the past several years expressed themselves on the role of the lawyer in the securities laws; their views clash sharply with the traditional notion of the responsibilities of lawyers. Most outspoken has been Commissioner A. A. Sommer.

Commissioner Sommer, speaking unofficially, states that "all the old verities and truisms about attorneys and their roles are in question and in jeopardy . . . ."[88] Noting that securities lawyers are increasingly called upon to serve broader interests than just those of their clients,[89] he asserts that conduct that was once tolerable is no longer.[90] Further, this trend is to continue: "[T]he role of the attorney, . . . the integrity of the attorney, and yes, in some measure, the independence of the attorney will be increasingly scrutinized."[91] Most surprisingly, Sommer disputes the traditional notion of the lawyer as advocate; he feels that in the future the lawyer will have to function as an independent auditor:

> This means several things. It means he will have to exercise a measure of independence that is perhaps uncomfortable. . . . It means he will have to be acutely cognizant of his responsibility to the public. . . . It means he will have to adopt the healthy skepticism toward the representations of management which a good auditor must adopt. It means he will have to do the same thing the auditor does when confronted with an intransigent client—resign.[92]

Sommer further asserts that such conduct is not at odds with a lawyer's responsibilities to his client.[93]

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87. For an extensive discussion of Rule 2(e) and the implications of its increased use, see Comment, *supra* note 72.

88. Sommer, *supra* note 56, at 83,689.

89. Sommer, *Directors and the Federal Securities Laws*, [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,669, at 83,801 (Feb. 21, 1974).

90. Sommer, *supra* note 56, at 83,692.

91. *Id.* at 83,691.

92. *Id.* at 83,689-90.

93. In support of this assertion, Sommer quotes the preface to the ABA Code of Professional Responsibility:

> Before the Bar can function at all as a guardian of the public interests committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era. *Id.*

Sommer appears to view the role of the lawyer as an arm of the SEC's enforcement of the federal securities law. Although owing his client certain responsibilities, the securities lawyer also has a duty to the public. This latter duty forces the lawyer to remain independent from his client and to assure that the client takes no action violative of the securities laws. In Sommer's own words, the lawyer under this theory is the "keeper of the stop and go signal."[94] In its landmark complaint in *SEC v. National Student Marketing Corp.*,[95] the SEC took action against lawyers who did not follow this philosophy, *i.e.*, who did not act properly as "keepers of the stop and go signals."

In 1972, the SEC filed its complaint against the National Student Marketing Corporation (NSMC), its officers and directors, its accounting firm and several of the auditors employed by the accounting firm;[96] also included as defendants were two law firms and several of their partners. The notoriety surrounding *National Student Marketing* has been due mainly to two facts. First, the law firms are both large, sophisticated firms,[97] unlike law firms previously charged with securities fraud. Second, the lawyers were charged with fraudulent conduct *qua* lawyers.[98]

The factual background to the case concerns a merger between NSMC and Interstate National Corporation (Interstate). A condition of the merger was that the accountant give a "comfort letter" as an assurance that the accounting firm had no reason to believe that unaudited interim financial statements of NSMC were not prepared according to generally accepted accounting practices or required any material readjustments. In the second claim of its complaint,[99] the

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at 83,693, *quoting Preface* to ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969).

94. *Id.* at 83,691.

95. [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,360 (D.D.C., complaint filed Feb. 3, 1972).

96. In a later action, criminal actions were brought against, among others, these two auditors, one a partner and the other an audit supervisor. They both were found to have acted with "reckless disregard" of their audit duties in connection with a NSMC proxy statement. They were recently sentenced to jail terms. *See* Wall Street J., Dec. 30, 1974, at 11, col. 1.

97. The firms were White & Case of New York and Lord, Bissell & Brook of Chicago. The accounting firm named as defendant was also a large, sophisticated firm, Peat, Marwick, Mitchell & Co.

98. One commentator has stated that the lawyers actively participated in the fraud, rather than limiting their activities to those of traditional counselors. *See* Note, *The SEC and the Securities Bar: Adversaries or Allies?*, 23 CATHOLIC U.L. REV. 122, 135-36 (1973). The more accepted view is that the lawyers were charged for acts taken *qua* lawyers. *See, e.g.*, Karmel, *supra* note 40, at 1156.

99. *See* [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,360, at 91,913-15.

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SEC made its important charges against the lawyers. The comfort letter was written by the accountants, but it contained a list of significant adjustments that should have been made in the statements. The SEC asserted that the comfort letter did not satisfy the condition of the merger agreement because the statements did require adjustments.[100] The first instance of fraud charged in the second claim against the attorneys representing NSMC and Interstate was that they had allowed the merger to close, while failing to disclose publicly the contents of the comfort letter, which would have reflected adversely on the value of NSMC's stock.[101]

At the closing meeting, before the closing of the merger was completed, the accountants informed NSMC's lawyers that they wished to add another paragraph to the letter which would state that if certain adjustments were made to the financial statements, the statements would reveal a net loss. The second charge of fraud was based on the lawyers' lack of action to inform others at the closing of this information.[102]

Both sets of counsel wrote opinion letters that all conditions necessary for the merger had occurred. Feeling that the comfort letter did not satisfy one of the conditions of the merger, the SEC made the giving of these opinions the third and fourth grounds of fraud against the lawyers under the second claim.[103]

The lawyers involved in *National Student Marketing* do not appear to have been active participants in fraud.[104] Rather, it was their actions as counsel that prompted the charges against them. Most interesting is the statement given by the SEC of what the lawyers did wrong. Their first mistake was to give the opinion letters and to fail to insist that the financial statements be revised and the shareholders be resolicited. Further, if that failed, the lawyers should have ceased "representing their respective clients and, under the circumstances, [notified] the . . . Commission concerning the misleading nature of the nine month financial statements."[105] Thus, the SEC seems to assert that if a lawyer feels his client is not taking proper action, he must

100. *Id.*

101. *Id.* at 91,913-16. At this time NSMC's reported earnings had shown a rapid growth which caused investors to value the earnings with a very high price earnings ratio. A reported loss would have destroyed this illusion of growth and the high multiple that it commanded.

102. *Id.*

103. *Id.*

104. *But see* Note, *supra* note 98, at 135-36.

105. [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,360, at 91, 913-17.

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either resign and disclose to the SEC information damaging to his client or be guilty of violating the securities laws himself.

National Student Marketing has yet to reach a decision on its merits; therefore, it is not known whether this new requirement placed on lawyers by the SEC will be given judicial approval. However, the recent case of *Meyerhofer v. Empire Fire & Marine Insurance Co.*,[106] discussed in the introduction to this Note,[107] gives credence to the propriety of the action prescribed by the SEC for a lawyer with a client who refuses to take the action which the lawyer feels is required by the federal securities laws. It will be recalled that Goldberg, a young lawyer, had tried to include in the prospectus disclosure of certain facts; when the client and the law firm disagreed, Goldberg resigned. He immediately disclosed the whole affair to the SEC. Later, when he was included as a defendant in a securities fraud suit against his former client, he delivered to the plaintiffs' attorney the affidavit which he had given to the SEC. The defendants in that suit asked that Goldberg be enjoined from disclosing confidential information regarding his former client. The trial court granted this injunction. It also dismissed without prejudice plaintiffs' complaint; the basis of this dismissal was that "Goldberg had obtained confidential information from his client Empire which, in breach of relevant ethical canons, he revealed to plaintiffs' attorneys in their suit against Empire."[108] The Second Circuit reversed.

Meyerhofer does not give direct support for the proposition that a lawyer should inform on his client to the SEC, because the decision concerns the disclosure to the plaintiffs' attorney, not the disclosure to the SEC. However, the court seemed to assume that Goldberg did nothing wrong when he went to the SEC. Indeed, the court held that under the circumstances he did not act improperly even when he delivered the affidavit to plaintiffs' counsel.[109]

Summary

As is evident, the whole subject of a lawyer's obligations, duties, and liabilities under the federal securities laws remains uncertain. There are few areas that one can point to and tell definitively what a lawyer must do to properly fulfill his function, or at the least to avoid

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106. 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3274 (U.S. Nov. 11, 1974).
107. See text accompanying note 1 *supra*.
108. 497 F.2d at 1194.
109. *See id.* at 1194-95.

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liability. While the exact status of the law on this subject remains difficult to ascertain, several conclusions can be safely made: (1) The responsibilities and liabilities of the securities lawyer have shifted from the traditional view of the attorney. He is given greater responsibility in protecting the public from his client; concomitantly, the onus of harsher sanctions is placed upon him when he fails to fulfill his responsibility. (2) However far this new public responsibility for the securities lawyer has reached at the present time, the SEC desires to see it go farther. The SEC would like the lawyer to obtain a great deal of independence from his client and to act as another enforcer of the securities law should the client go beyond the bounds of the law. (3) If the current trend continues, and there have been no indications that it will not, the securities lawyer will in the future be held to an increasingly higher standard of conduct.

IMPLICATIONS FOR THE LEGAL PROFESSSION

As a comparison of the first two parts of this Note clearly indicates, the securities lawyer has in the last ten years found himself separated from the remainder of the legal profession as to his duties and obligations. Whereas lawyers specializing in other areas have experienced little shift from the traditional standards of conduct, the securities bar has been continually threatened with higher liabilities and has been challenged to accept a role basically at odds with the traditional and comfortable view of the lawyer as a loyal advocate for his client. A legitimate question that must be asked is why this revolution of attorney conduct has occurred only in the securities law area. If the trend in that area is beneficial, why should it not be extended to all lawyers? Conversely, if the traditional framework of attorney conduct, duties, and liabilities represents a proper balance between the interests of the client, the public, and the legal profession, why should it be abandoned for securities practice?

Several reasons have been put forth to explain why higher standards of conduct should be expected of the securities bar. To begin with, the SEC's small staff and limited resources require it to be dependent upon the "probity and diligence" of the lawyers who appear before it.[110] Without the cooperation of the legal profession, the SEC could not accomplish its mission of policing the securities field. Further, securities lawyers "have since the earliest days of the federal securities laws been at the heart"[111] of securities regulation. This is because the securities lawyer plays such a vital role for his client:

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110. SEC File No. S7-520, 248 BNA SEC. REG. & L. REP. E-1 (Apr. 10, 1974).
111. Sommer, *supra* note 56, at 83,688.

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> [T]he professional judgment of the attorney is often the "passkey" to securities transactions. If he gives an opinion that an exemption is available, securities get sold; if he doesn't give the opinion, they don't get sold. If he judges that certain information must be included in a registration statement, it gets included . . . ; if he concludes it need not be included, it doesn't get included.[112]

Because of this essential function which the securities lawyer plays, it is felt that the easiest way to control participants in securities transactions is to control their attorneys. For example, Justice Douglas, while serving as head of the SEC, asserted in 1935 that "if the mores of our legal bishops were changed, we would have solved the major problems in finance."[113] Further, since the public in general is not represented in securities transactions, it depends to a large degree upon the attorneys and other professionals involved for information and probity.[114] The argument runs that it therefore is incumbent upon the attorney to recognize the reliance placed upon him by the public and to accept the responsibility which flows with it.

While the above arguments seem persuasive, analysis shows that they could easily apply to other areas of the law. Take for example the tax lawyer. Certainly there is great public interest in this area. If one person improperly pays too little tax, all other taxpayers are burdened by heavier requirements. Further, the tax lawyer plays a central role in his clients' tax planning; certainly the great majority of transactions entered into to reduce taxes would never occur without the mind of the tax lawyer, aided by the accountant. Although the IRS is a strong agency, a lack of cooperation by the professionals working in the tax field would likewise render it little better than impotent.[115] A similar analysis can be made in other specialties, for instance the real estate field where little could be accomplished without the skill of the real estate lawyer and where there exists a great potential for public harm or benefit. Even the general practitioner is an essential cog in modern life and can strongly affect the public welfare.[116]

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112. *Id.* at 83,689.

113. Douglas, *supra* note 41, at 69.

114. SEC File No. S7-520, *supra* note 110, at B-1.

115. *Cf.* J. Carey & W. Doherty, Ethical Standards of the Accounting Profession 89-90 (1966).

116. It is interesting to note the lax standard of care applied to a general practitioner in Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 386 U.S. 987 (1962). There a lawyer had drafted a will which violated the rule against perpetuities, thereby depriving the plaintiff beneficiaries of their bequest. The beneficiaries were allowed to sue the lawyer for malpractice as third party beneficiaries. However, the court held that the attorney was not guilty of malpractice because the Rule Against Perpetuities is so complex that few lawyers understand it. Compare this with

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An examination is needed into the goals, problems, and possible results of the new standards to which securities lawyers are being held. If this trend is desirable, then serious consideration should be given to whether the new role of the securities lawyer should be broadened to all attorneys.

The philosophy behind the new role urged upon securities lawyers, with its emphasis upon the public good and the thwarting of the goals of "money hungry defrauders," certainly has a superficial appeal. This is especially so in this period when public respect for the bar seems quite low.[117] However, in an area of such importance and with such great implications not only for the bar but also for the public in general, it is not enough to be swayed by first impressions or surface appearances. Rather, one must go beyond pleasant generalizatons and carefully study how such a shift in the role of the lawyer will affect the legal profession, how it will change the legal services clients receive, and what benefits or detriments the public will receive.

The securities bar in general has seemed dismayed by the increasing duties and liabilities that have been placed upon it.[118] In response to the new trend, lawyers have made a number of specific complaints. To begin with, there is a bona fide fear that an acceptance of the standards urged by the SEC would prove to be deleterious to the attorney-client relationship.[119] It is asserted by the bar that this would prove to be inimical to the interests of both the client and the public. With respect to the public, it is felt that as clients begin to realize that their lawyers' loyalties are not fully owed to them, they will become increasingly unwilling to convey possibly damaging information to their coun-

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the standard to which securities lawyers are expected to meet when dealing with equally complex matters. See notes 58-68 *supra* and accompanying text.

117. This ebbing in the public image of lawyers appears to be due in large part to the Watergate scandals and the participation of lawyers in various illegal acts. For several commentaries by the popular media concerning lawyers and Watergate, see *America's Lawyers: "A Sick Profession,"* U.S. NEWS & WORLD REPORT, Mar. 25, 1974, at 23; *Lawyers' Watergate*, N.Y. Times, June 11, 1974, at 40, col. 1; *Criminal Lawyers*, WCBS-TV Editorial (June 18, 1974). For the view of former Chief Justice Warren on the subject, see Warren, *Law, Lawyers and Ethics*, 23 DE PAUL L. REV. 633 (1974). It should not be assumed, however, that all negative feelings towards the legal profession have had their genesis in Watergate. Consider, for example, S.V. Benet, *The Devil and Daniel Webster*, 2 SELECTED WORKS OF STEVEN VINCENT BENET 39 (Farrar & Rinehart 1942) (where the devil was referred to as "King of the Lawyers"). *See also* W. SHAKESPEARE, King Henry VI, Act IV, Sc. 2, Line 86 ("The first thing we do, let's kill all the lawyers.").

118. *See generally A Bid to Hold Lawyers Accountable to Public Stuns, Angers Firms*, Wall Street J., Feb. 15, 1972, at 1, col. 1.

119. *See* Karmel, *supra* note 40, at 1159-60, Wall Street J., *supra* note 118, at 1, col. 1.

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sels. This will render the lawyer less able than at present to insure that his client remains within the securities laws; also, unless the lawyer receives full information, it will be impossible for him to give the client competent advice. Thus, the chance for securities violations might actually increase.[120] This decline in the attorney-client relationship also could harm the client. Some lawyers may hesitate to represent a client fully when so many sanctions threaten him. One commentator openly charges "a conscious effort [by the SEC] to encourage lawyers to trade off the rights of some clients in order to curry favor with the commission."[121] The great fear is that the attorney will be intimidated from representing his client with zeal, as traditionally has been required of him.[122] It is questioned whether an attorney who declines to represent his client zealously in order to protect himself would not be allowing "his personal interests . . . to dilute his loyalty to this client," as is forbidden by the Canons of Professional Responsibility.[123] Finally, there is the practical question of whether a client is ever going to be able to obtain hard, specific advice from the lawyer. For example, whether privately issued stock can be resold without a registration statement is an exceedingly difficult question under the present state of the law, a matter on which it is essential for a layman to receive the best advice available. After *Spectrum*,[124] however, it may prove impossible to find a lawyer willing to give an affirmative answer, even when he truly believes that to be the case, for fear that his advice will result in sanctions against him should his opinion prove faulty. Of relevance to this point is the conversation one commentator relates as having occurred between a securities lawyer and his client. The attorney gave his client very cautious advice. The client replied, "Are you saying that for my

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120. Comment, *David and Goliath Revisited*, 23 DE PAUL L. REV. 737, 749 (1974); Wall Street J., *supra* note 118, at 17, cols. 3-4; *see* Messer, *Roles and Reasonable Expectations of the Underwriter, Lawyer and Independent Securities Auditor*, 52 NEB. L. REV. 429, 458 (1973).

121. Freedman, *A Civil Libertarian Looks at Securities Regulation*, 35 OHIO ST. L.J. 280, 285 (1974). In this same article, Dean Freedman levels an extremely harsh criticism at the SEC and its practices. He writes:

> In sum, therefore, securities regulation is characterized by denial of the right to counsel, corruption of the independence of the Bar and traditional standards of attorneys' obligations to their clients, a police-state system of investigation, and denial of a variety of other basic due process rights. *Id.* at 288.

122. *Id.* at 285; Messer, *supra* note 120, at 458; Comments of the ABA Committee on Federal Regulations of Securities, *supra* note 86, at F-3.

123. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1969). There is also the issue of whether a lawyer who informs on his client to the SEC is using "information acquired in the course of the representation of a client to the disadvantage of the client." *Id.* EC 4-5.

124. See notes 58-63 *supra* and accompanying text.

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protection or for yours?"[125]

Lawyers also complain that it often is not a case of black or white whether an action is within the securities laws. The securities laws involve many complex issues which seem to be constantly changing.[126] Attorneys charge it is unfair to hold them liable for acts of their clients which arguably could have been seen as within the law. It likewise is difficult to perceive at what point legitimate, robust advocacy goes too far. As Commissioner Sommer has pointed out, "[I]t is too easy to confuse vigorous, even commendable, representation of a client with countenancing misconduct."[127]

The action prescribed by the SEC of informing on the client is particularly distasteful to the bar. It is interesting to note a court's comment on a charge that a national accounting firm should have made public its disagreement with a client that ended in the firm being fired:

> It is at least mildly perplexing to speculate on the prospect of an accountant's public attack upon a client on the occasion of being discharged by the client . . . in an area where responsible accountants could (and did) responsibly differ.[128]

An accountant traditionally has been seen as much more independent from his clients than a lawyer; certainly the embarrassment of a lawyer upon informing on his client would be concomitantly greater.

A final protest leveled at the new trend is that the duties and liabilities of a securities lawyer are changing so rapidly that an attorney

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125. Freedman, *supra* note 121, at 286.

126. The changing nature of securities laws is well reflected in court decisions concerning Rule 10b-5. It has become quite difficult to discern the status of each of the various elements needed for Rule 10b-5 recovery. For example, it was once rather uniformly thought that reliance by plaintiffs on the alleged fraud was a prerequisite to recovery in Rule 10b-5 cases. However, in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), the Supreme Court held that, in that particular case, proof of reliance was not necessary for recovery. *Id.* at 152-54. At least one court has interpreted *Ute* as holding that when materiality is shown, proof of reliance is not needed. *In re* Penn Cent. Sec. Litigation, 347 F. Supp. 1327, 1344 (E.D. Pa. 1972), *modified in part*, 357 F. Supp. 869 (E.D. Pa. 1973). Likewise, scienter on the part of the defendants was at one time considered a necessary Rule 10b-5 element. Today there is considerable controversy over whether a showing of mere negligence is sufficient. *Compare* Myzel v. Fields, 386 F.2d 718, 734-35 (8th Cir. 1967) ("Proof of 'scienter' . . . is not required under Section 10(b) . . . ."), *with* Shemtob v. Shearson, Hammill & Co., 448 F.2d 442, 445 (2d Cir. 1971) ("It is insufficient to allege mere negligence . . . ."), *and* White v. Abrams, 495 F.2d 724 (9th Cir. 1974). The trend in general has been from strict to more lax standards. For an excellent discussion of the various elements necessary for Rule 10b-5 recovery, see Note, *SEC Rule 10b-5: A Recent Profile*, 13 WM. & MARY L. REV. 860 (1972).

127. Sommer, *supra* note 56, at 83,692.

128. Gold v. DCL, Inc., [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,036, at 94,169 (S.D.N.Y. 1973).

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cannot know what is expected of him or how he can protect himself. The danger exists that such uncertainty may demoralize and virtually paralyze the securities bar.[129]

Fundamentally, the controversy between the SEC and the securities bar distills down to a basic difference in viewpoint as to how the lawyer can best serve the public. The issue is whether the lawyer as an advocate can effectively serve the public good. The SEC feels that overrepresentation of the client is detrimental to the country as a whole. As Justice Douglas stated while SEC Commissioner: "Service to the client has always been the slogan of our profession. And it has been observed so religiously that service to the public interest has been sadly neglected."[130] This, however, strikes at a basic assumption long held by the bar, that the whole legal system runs best by lawyers' strong advocacy.

The Code of Professional Responsibility states: "The duty of a lawyer, both to his client and *to the legal system*, is to represent his client zealously."[131] Thus, a lawyer has an ethical duty to the system itself to represent his client loyally and fully. This is not because the legal system is unfeeling about the public good but rather because it traditionally has been felt that the public good is optimized by each participant in the system having strong representation; out of this clash of forces theoretically emerges a solution in the public interest.

The SEC has attempted to supplant this theory of the legal system with a new one, based on the premise that the public good is maximized by requiring lawyers to act with an eye to the public rather than for the best interests of their clients. A strong argument in support of this position would reason that an advocacy system requires all groups to be represented, but the public often stands unprotected; therefore, the legal profession must assume an ethical duty to insure that those they represent do not unfairly take advantage of the vulnerable and the weak.[132] Unfortunately, the SEC has failed to articulate in any complete and logical fashion a philosophical justification of its theory of the lawyer's proper role. In attempting to discard a view of the lawyer which has its roots in the very fabric of our legal system, the SEC has put forth little more than what the ABA has called "generalized rhetoric."[133] Some of the Commission's proposals seem

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129. Lowenfels, *supra* note 16, at 437-38.

130. Douglas, *supra* note 41, at 67.

131. ABA Code of Professional Responsibility EC 7-1 (1969) (emphasis added).

132. Derieux, *Public Accountability Under Securities Laws*, 35 Ohio St. L.J. 255, 257 (1974).

133. *See* Comments of the ABA Committee on Federal Regulations of Securities, *supra* note 86, at P-3.

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poorly thought-out at best, notably the idea that lawyers should serve the same role as an independent auditor. The auditor represents himself to the public as a totally disinterested expert whose objective reports are designed as much for the public as for the client; no matter how much the lawyer's role changes, it seems doubtful he could ever achieve such a degree of independence. A decade ago, the SEC gave the following description of the roles of lawyers and auditors:

> Though owing a public responsibility, an attorney in acting as the client's advisor, defender, advocate and confidant enters into a personal relationship in which his principal concern is with the interests and rights of his client. The requirement of the Act of certification by an independent accountant, on the other hand, is intended to secure for the benefit of public investors the detached objectivity of a disinterested person. The certifying accountant must be one who is in no way connected with the business or its management and who does not have any relationship that might affect [his] independence . . . .[134]

It seems doubtful that the SEC really expects such detached objectivity and independence from attorneys; if it does, then the question must arise as to who then is left to protect the bona fide rights of the client. Moreover, while making such proposals which entail a violent reworking of the traditional attorney-client relationship, the SEC has failed to give the lawyer practical advice on how he can reconcile the competing demands of the public and the client, so that the responsibilites of the bar to both are adequately and professionally fulfilled.[135]

Conclusion

What can the legal profession as a whole learn from the experi-

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134. *In re* American Fin. Co., 40 S.E.C. 1043, 1049 (1962).

135. Historically, such practical advice has not been beyond the capabilities of the SEC. An example of the ability of the staff of the SEC to provide concrete solutions in situations where lawyers have been implicated in their clients' violations of the securities laws is the settlement between the SEC and an attorney arrived at in *In re* Ferguson, Securities Act Release No. 33-5523 (Sept. 11, 1974), 268 BNA Sec. Reg. & L. Rep. A-25 (1974). The attorney had assumed principal legal responsibility to review a prospectus which turned out to contain material omissions. The SEC brought a Rule 2(e) proceeding against the lawyer. The lawyer's law firm agreed to take the following steps in exchange for a dismissal of the proceedings: (1) Independent auditors would be utilized and the firm would inquire into the background of the participants of transactions. (2) The firm would explain to all interested parties its duties to the issuer and the securities holders. (3) Every two weeks, all partners would meet to discuss cases. (4) The firm would require representations from parties regarding the accuracy and completeness of their statements. (5) Each partner and associate would attend each year at least one municipal bond workshop or seminar. In this settlement, the SEC proved itself capable of reconciling the competing demands of the public and the client upon the lawyer, with an added emphasis upon the maintenance of expertise in the securities law. Regrettably, such practical advice is extremely rare from the SEC.

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ence of the changing role of the securities lawyer? The higher standards to which securities lawyers are being held concerning the quality of their work seems laudable. When a man holds himself out to be a specialist in an area of the law, it is only right that the public be entitled to expect highly skilled advice from him. There would appear to be no reason why this should not apply to all specialists. Moreover, it is perhaps time to hold even the generalist to a higher standard of skill in his work; the law is a profession and the bar can command public respect and admiration only if it requires of its members the highest professional expertise. The huge damage claims to which securities lawyers appear likely to be subjected in the future are unfortunate, since they seem far in excess of the wrong done.[136] This problem, however, can be solved by some limitation of damages.[137]

More difficult are the problems associated with the SEC's desire for the securities attorneys to stop acting solely as advocates and to maintain independence from their clients. On balance, the SEC's easy generalizations in support of its proposition do not supplant the need for a well thought-out philosophical justification of such a theory and for a thorough examination of all the ramifications such a change would entail; both matters would seem essential when the issue is the abandonment of a theory such as the advocacy role of the bar which has had such a central and fundamental place in our legal system. Still, the SEC has raised troubling questions as to the continued efficacy of the adversary system; these questions appear to go beyond the securities law field. It therefore seems incumbent upon the legal profession to begin a searching and prolonged study into the proper role of the lawyer in modern society to determine if the harm caused by the advocacy system outweighs the benefits derived. As of this moment, such an analysis has not been undertaken; until this inquiry has been made, any wholesale rejection of the advocacy system seems premature.

136. See notes 71-74 *supra* and accompanying text.

137. *See, e.g.*, ALI FEDERAL SECURITIES CODE § 1403 (Tent. Draft No. 2, 1973). For commentary asserting a need for limitations on damages for all defendants, not just lawyers, in actions based on Rule 10b-5, see Note, *Rule 10b-5: The Rejection of the Birnbaum Doctrine*, *supra* note 71, at 624-31. In the past year, several provocative proposals have been made to limit damages under Rule 10b-5. In Comment, *Liability Under Rule 10b-5 for Negligently Misleading Corporate Releases: A Proposal for the Apportionment of Losses*, 122 U. PA. L. REV. 162, 172-78 (1973), the author suggests an apportionment of damages. In Note, *Rule 10b-5: The Rejection of the Birnbaum Doctrine*, *supra* note 7, at 631-33, the author suggests an arbitrary maximum limit on liability for each defendant.

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Ex. SCG 30 for I.D.

WSJ 6/28/74

Lawyer Cleared of Violating Legal Ethics In Telling SEC of Client's Possible Fraud

By FREDERICK ANDREWS
Staff Reporter of THE WALL STREET JOURNAL

NEW YORK — A federal appeals court has cleared a young securities lawyer who got into trouble after doing what federal authorities would like to have all lawyers do—blow the whistle on possible fraud by a client.

Reversing a lower court, the Second Circuit Court of Appeals here ruled that the lawyer, Stuart Charles Goldberg, hadn't violated legal canons on preserving client confidences. It said Mr. Goldberg made disclosures to defend himself against charges of wrongdoing, and the canons allow him to do that.

So sensitive was the issue of confidentiality that the three-judge panel ordered that the records and briefs presented before it be sealed. Lawyers involved in the case won't discuss it.

The lower court's decision last August seriously undercut a prime contention of the Securities and Exchange Commission. In the SEC's view, a lawyer involved in a public offering has a duty to the public to report fraud by a private client. This view is wildly unpopular among securities lawyers, who term it a directive "to fink on a client." When Mr. Goldberg got into trouble, a good many securities lawyers thought he got what was coming to him.

Allegations About Law Firm

Mr. Goldberg's predicament was rooted in allegations he made to the SEC about his former law firm, Sitomer, Sitomer & Porges, New York, and Empire Fire & Marine Insurance Co., Omaha, for which the firm prepared a public offering in 1972. Though Mr. Goldberg's affidavit isn't public, the SEC since has charged Empire and the Sitomer firm with fraudulently failing to disclose questionable arrangements about legal fees. As a finder's fee, Sitomer was to receive $200,000 of the offering proceeds, plus cut-rate stock valued at $205,000, the SEC charges. This was in addition to $65,000 in legal fees disclosed in the offering prospectus.

Narrowly speaking, Mr. Goldberg wasn't in hot water for going to the SEC. Judge Lloyd F. MacMahon, the lower-court judge, explicitly declined to rule on that action. Instead, Judge MacMahon found Mr. Goldberg did wrong when he told a third party what he told the SEC. Mr. Goldberg did so to avoid being named as a defendant in a shareholder suit brought against Empire and Sitomer when the fee arrangement eventually became public. Mr. Goldberg gave the plaintiffs' lawyers a copy of his 30-page statement to the SEC.

Last August, Judge MacMahon barred both Mr. Goldberg and the shareholders' lawyers—Bernson, Hoeniger, Freitag & Abbey—from any further role in the case. The Bernson Hoeniger firm was "tainted" by what it learned from Mr. Goldberg, the judge ruled. He also dismissed the lawsuit, though he allowed the holders to bring a new lawsuit with new counsel.

Panel Reverses Decision

The federal panel reversed Judge MacMahon's decision to disqualify the Bernson Hoeniger firm and dismiss the suit. Mr. Goldberg didn't violate legal canons, the appeals court said, and thus the law firm couldn't be tainted by its dealings with him.

The higher court nevertheless left standing Judge MacMahon's injunction barring Mr. Goldberg from representing the Empire holders or further disclosing the Empire matters except as a witness in the holders' suit. As that merely barred the 22-year-old lawyer from doing what he never intended to do, the decision was seen as a clear victory for Mr. Goldberg. "I'm pretty happy with it," said Lawrence M. McKenna, his lawyer. (Mr. Goldberg was said to be on vacation and unavailable for comment.)

Mr. Goldberg isn't out of trouble yet, however. Empire and its president, Gary O. Cross, are countersuing him along with the Sitomer firm and its three principals. The company is seeking $150,000 in damages plus anything it might have to pay in the holders' lawsuit. Mr. Cross seeks to recover the $309,928 he agreed to pay Empire as indemnification. That payment was part of settling the SEC fraud charges against Empire and its two top officers. (The SEC complaint, brought last October, is still pending against the Sitomer firm, which denies any wrongdoing. Empire and its two offices consented to an injunction barring them from future securities law violations, without admitting or denying the allegations.)

Issue Arose in 1973

The federal panel's opinion says that Mr. Goldberg raised questions about the Empire fee arrangements in early 1972 while the $5.3 million offering was being prepared. Apparently, matters came to a head in January 1973, when the firm of Sullivan & Cromwell learned of similar fee arrangements with the Sitomer firm in a proposed $20 million offering by Glacier General Assurance Co. Sullivan & Cromwell, acting as counsel for Drexel Firestone Inc., the underwriters, reportedly demanded that Glacier drop the Sitomer firm, which it did, and make full disclosure. (Sources say Sullivan & Cromwell independently went to the SEC almost immediately after Mr. Goldberg did.)

The Glacier dispute apparently revived debate within the Sitomer firm over the undisclosed Empire terms. According to the appeals panel opinion, Mr. Goldberg "insisted on a full and complete disclosure of fees, (but) the Sitomer partners apparently disagreed." Mr. Goldberg then got a lawyer, who took him to Stanley Sporkin, deputy director of SEC enforcement, for a [illegible] Sunday session. The next day Mr. Goldberg resigned from the Sitomer firm and gave the SEC a formal statement, backed by numerous documents. (The Sitomer firm contends in court papers that it, too, had hired a lawyer and intended to go to the SEC that very day.)

Ex. SCG 30 for I.D.
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for I.D.

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New York Law Journal

OFFICIAL DAILY LAW NEWSPAPER DESIGNATED PURSUANT TO THE JUDICIARY LAW

NEW YORK, FRIDAY, OCTOBER 26, 1973

New Case Also Tests 'Whistle-Blower' Theory

SEC Seems Firm in Policy On 'Improprieties' of Bar

By S. James Rosenfeld

The Securities and Exchange Commission is apparently determined to prove two things by its actions in connection with events concerning Empire Fire & Marine Insurance Co. The first, demonstrated by its action last Friday in filing a complaint against Empire and the law firm of Sitomer, Sitomer & Porges is that firm action will be taken against attorneys the Commission feels acted improperly in their professional duties.

The second is that the agency will, if necessary, come to the aid of members of the Bar who, in an effort to adhere to the high standards the Commission seeks to define, disclose improprieties to the Commission staff. Verification of this step came on Tuesday when the SEC filed an *amicus curiae* brief in *Meyerhoffer v. Empire Fire & Marine Insurance Co.*, now on appeal in the Second U. S. Circuit Court of Appeals.

Position Unknown

The Commission's exact position in this second case is not yet known because the district court has, unfortunately, sealed a number of the papers filed in connection with the appeal. In fact, the Commission itself has been unable to obtain various papers of other parties involved in the litigation.

Moreover, it appears that the SEC apparently arrived at its decision on this second point—the defense of "whistle blowers"—only very reluctantly. For example, when Judge Lloyd F. MacMahon of the Southern District Court handed down his decision in the case, reported in the LAW JOURNAL of Aug. 31, high officials of the Commission's Division of Enforcement repeatedly denied that they would enter the case on appeal.

Irving M. Pollack, director of the division, said at that time that the Commission had no obligation to become involved in a private civil lawsuit. He pointed out that while it was entirely possible that the SEC would file its own action, the two were quite separate. This position was reaffirmed up and down the line.

Change in Views

While it is possible that the Commission intended to enter the action all along but determined not to reveal its intentions at that time, the more likely possibility is that staff officials' initial reaction was a true indication of their views at that time, views which have since changed because of necessity.

That necessity was the conclusion reached after a thorough consideration of the implications of the SEC's theory in *National Student Marketing* that under some circumstances, an attorney had an obligation to disclose to the Com-

(Continued on page [illegible], column 1)

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for I.D.

mission improprieties on the part of his client. In *Meyerhoffer*, it appears that an attorney, Stuart Charles Goldberg, did exactly as the Commission wished and for his reward was held by the district court to have violated the Canons of Ethics. For the Commission to have refused to enter the case on appeal would have meant an early and quick end to its *National Student Marketing* theory.

Theory Illustrated

Piecing together the information that is available—the Meyerhoffer decision itself, some briefs filed in the district court, the SEC's complaint in Sitomer, its litigation release and what is available in the record on appeal — results in a classic situation for application of the "whistle blower" theory. Although all the facts are as yet unknown, it appears that this is what happened

Mr. Goldberg was associated with the Sitomer firm as a "limited partner," in effect an arrangement whereby he occupied office space in the firm and performed limited duties in connection with clients the firm was counseling, but did not share in the profits of the firm. He began his association with the firm on Nov. 15, 1971 and resigned Jan. 21, 1973.

The Empire offering became effective on May 31, 1972. It involved the offering of 500,000 shares at $16 per share and was managed by Faulkner, Dawkins & Sullivan Securities Corp., whose counsel was Jacobs, Persinger and Parker. The cover page of the S-1 for that offering lists Jacob Aschekenazy of the Sitomer firm as one agent for service.

Memo of Agreement

The memorandum of agreement concerning compensation between Empire and the Sitomer firm states:

1. Immediate payment of $5,000 retainer to be applied "toward services in analyzing the Company, arranging meetings, and negotiating with investment bankers."

2. Payment of $10,000 to the Sitomer firm on receipt of a "Letter of Intent" for a public offering or private placement or upon satisfactory agreement for acquisition.

3. Upon receipt of funds from a public offering, private placement or acquisition, "an additional amount which, when added to the $15,000 fees enumerated above, will equal 2.5 per cent of the gross offering price, private placement amount, or 4 per cent of the acquisition amount, will be paid to S. S & P."

4. Payment of usual fees for all legal work.

5. Acquisition by S. S & P of an option to purchase 2.5 per cent of the outstanding stock of Empire at book value as computed from Dec. 31, 1970 financials. "It is expressly understood and agreed that such option shall not be exercised by S. S & P until a financing plan or acquisition of the Company is consummated, and that

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such option will be terminated if a financing or acquisition of the Company is not consummated as a result of the efforts of S, S & P."

$209,000 Profit

The effect of the last paragraph was to enable the Sitomer firm to purchase stock at $2.05 per share, sell it in the public offering for $16, and reap a profit of about $209,000.

It is not clear what duties Mr. Goldberg performed in connection with Empire. An affidavit filed on May 25, 1973, by George D'Amato of D'Amato, Costello & Shea, counsel to the Sitomer firm, states that he spent about 200 hours on Empire, a "considerable portion" on matters relevant to disclosure of fees. It further states that: "In this matter, Mr. Goldberg had indicated that prior to the filing of the registration statement of Empire, he had made informal inquiring to the Securities and Exchange Commission regarding the appropriate treatment of fees."

An affidavit filed on June 7, 1973, by George Berlstein of Aranow, Brodsky, Bohlinger, Benetar, Einhorn & Cann, counsel to Empire, says that Mr. Goldberg "acted as counsel in connection with the Empire offering" and "rendered legal services relating to the Empire registration and offering."

Other Services

It mentioned, specifically, that Mr. Goldberg reviewed Empire's minute books and other papers to prepare spread sheets on Empire's prior offerings and was present at meetings and privy to confidential discussions with members of the Sitomer firm respecting decisions concerning Empire.

Whether this was sufficient knowledge to make Mr. Goldberg aware of the compensation agreement is disputable, particularly in view of a memorandum which he prepared, dated Jan. 24, 1972, on the subject of "Attorneys Compensation Incident to Registration under the 1933 Act." The memo discusses the matter of compensation only in a general manner and concludes by quoting Item 56 of Securities Act Release No. 4936 (Dec. 9, 1968), which states:

"Careful consideration should also be given to whether the interest of such counsel in the registration, or his activities in organizing, managing or promoting the venture may not constitute him a 'partner,' 'finder,' or 'executive officer' of the registrant, as those terms are used in the forms. *Where such relationships exist, the required disclosures should be made notwithstanding the absence of an official title.*" (Emphasis supplied by NYLJ.)

The record also shows that when another attorney joined the firm in December, 1972, he reviewed all prior and future compensation agreements and, although the firm believed it had done nothing improper, it agreed in the future to disclose in registration statements all fees received, whether for counsel fees or otherwise.

According to statements in the record by Mr. Goldberg, he first became aware of the compensation agreement sometime in January, 1973, apparently in connection with work he was doing preparatory to the offering of Glacier General Assurance Company, due to go effective in the week of Jan. 22, 1973. This $20 million offering was being managed by Drexel Firestone, whose counsel was Sullivan & Cromwell.

Apparently there was extended discussion in the Sitomer firm concerning the compensation agreement. Mr. Goldberg contends that he was unable to persuade the principals of the firm that such compensation must be disclosed and therefore retained Burton H. Finkelstein of Phillips, Nizer, Benjamin, Krim & Ballon, as counsel, asking him to contact Stanley Sporkin, associate director of the SEC's Division of Enforcement. Mr. Finkelstein arranged a meeting for Monday morning, Jan. 22, 1973. That prior evening, Mr. Goldberg telegraphed his resignation to the firm and advised it of his pending meeting with the SEC "for the purpose of making full disclosure regarding activities of the firm in regards to securities practice." Mr. Goldberg spent most of that week preparing and submitting an affidavit to the SEC.

Probe Started

On the basis of that affidavit, the Commission suspended its processing of the Glacier registration and commenced an investigation of the Sitomer firm. Upon learning of the compensation arrangement, Sullivan & Cromwell advised Drexel Firestone to make whatever disclosures were necessary and to withdraw the offering, which was done.

On April 12, 1973, Empire filed its annual 10-K with the SEC and, for the first time, disclosed the compensation agreement with the Sitomer firm. A stockholder's class action was filed on May 2, 1973, and it was then that plaintiffs' counsel, Bernson, Hoeniger, Freitag & Abbey, first became aware that Mr. Goldberg was no longer associated with the firm.

According to affidavits filed by Mr. Goldberg and Berthold H. Hoeniger, two meetings were held between the two to determine if Mr. Goldberg should properly be named as a defendant in the class action. Mr. Goldberg revealed his previous actions, but refused to furnish a copy of his SEC affidavit unless the SEC approved.

Following discussions with William P. Sullivan, special counsel to the Division of Enforcement, who informed Mr. Goldberg that he had no objection, the affidavit was provided Mr. Hoeniger.

Questions Raised

The district court's decision raised a number of interesting questions. The one most puzzling to lawyers is how a court can issue an injunction against a person who is not named as a party in the action and who has not been served. This was the case with respect to Mr. Goldberg.

Equally confusing is a statement in Judge MacMahon's opinion that "the court does not stop to inquire whether any information which Goldberg or his firm (sic) may have disclosed to plaintiffs' counsel was in fact confidential, for such an inquiry would reveal the very confidences sought to be protected."

This appears to say that the court reprimanded Mr. Goldberg for revealing confidential information although the court did not examine the information to see if it was, in fact, confidential.

That confusion has not been clarified to any extent by the court's sealing of certain critical papers. The extent of the secrecy is revealed, for example, by the fact that the Securities and Exchange Commission, on September 26, filed a motion to examine sealed portions of the record in order to determine whether it should enter the case as *amicus*. Incredibly, that motion was denied.

Despite the fact that the Commission's brief, itself, was submitted under seal, it appears all but certain that its position is in support of Mr. Goldberg. One follower of the case suggested that, perhaps, the SEC was intervening to defend the propriety of Mr. Goldberg's discussions with the Commission staff. Since Judge MacMahon specifically refused to make any findings on that point, that alternative seems highly unlikely. Moreover, the agency's action in filing against the Sitomer firm appears to leave it no choice except to support Mr. Goldberg.

There is, additionally, the critical question of the fate of the SEC's "whistle-blower" theory. Attorneys' criticism of the Commission's position, whether that criticism is cloaked in the language of "lawyer-client privilege" or wrapped in the cellophane of practicality, has been loud and unremitting. There are those who will, in good faith, point to Mr. Goldberg's fate thus far as the perfect example of how the SEC has gone off into "ivory-towerland."

Putting aside the Bar's obligation to the public, there are practical reasons why the problems raised by the "whistle-blower" theory should be defined and resolved and why procedures should be formulated for handling matters like the *Meyerhoffer* case. The Commission's filing of the *Sitomer* complaint and its entry into the *Meyerhoffer* suit reaffirm its commitment to *National Student Marketing*.

When institutional persistence is added to the balance, it becomes entirely possible that other attorneys will find themselves in Mr. Goldberg's position sometime in the future. They would take some comfort in having professional support and the ability to explain their position to the public.

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EX. SCG 32 for I.D.

New York Law Journal

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OFFICIAL DAILY LAW NEWSPAPER DESIGNATED PURSUANT TO THE JUDICIARY LAW

NEW YORK, WEDNESDAY, OCTOBER 24, 1973

Law Firm, Corporate Client Accused of Fraud by SEC

The Securities and Exchange Commission last week filed a complaint against a New York City law firm, its general partners, one of its clients and two of its officers charging them with violating the federal securities laws.

Charged with violating the registration and antifraud provisions of the 1933 Act and the antifraud provisions of the 1934 Act were the firm of Sitomer, Sitomer and Porges, 415 Park Avenue, and its three general partners, Alvin L. Sitomer, Stephen I. Sitomer and Robert E. Porges; Empire Fire and Marine Insurance Co., which the firm took public, and the company's president, Gary O. Gross, and executive vice-president, Yale Kaplan.

Injunction Sought

The commission, in its complaint filed Friday in U. S. District Court, sought an injunction against further violations of sections 5(b), 7, and 17(a) of the Securities Act of 1933 and Rules 408 and 163, thereunder, and section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

The commission's complaint alleges that the Sitomer firm and its three principals instituted a scheme whereby they would solicit the officers of private companies to enter into written compensation agreements with the law firm. These agreements typically provided that if the firm was successful in assuring that there was a public offering of the stock of these companies, then the companies would pay to the firm a cash fee of approximately 2.5 per cent and would allow the firm to purchase approximately 2 per cent of the company's outstanding stock at cheap pre-public offering prices. In addition, it was alleged, the agreements provided that the firm be paid customary fees for legal work done.

The commission's complaint further alleged that all of the named defendants failed to disclose to the public, to underwriters and its auditors the material facts surrounding the compensation agreement between Empire Fire and Marine and the Sitomer firm.

The commission alleged that these defendants in a registration statement and prospectus filed with the commission and dated May 31, 1972, made untrue statements regarding the cost of the offering, the use of proceeds and the amount of fees paid to the Sitomer firm and also failed to disclose the fact that Empire was to pay finders' fees to the Sitomer firm in the form of cash and cheap stock.

Other Allegations

The complaint also alleged that the principals of the law firm caused a registration statement for Glacier General Assurance Company to be filed with the commission which failed to disclose, among other things, that Glacier General was to pay the firm a cash finders' fee of 2 per cent of the gross offering price or $100,000; and that the profit of approximately [illegible] on the cheap Glacier stock transferred to the Sitomer firm might be considered further finders' fees, in light of an agreement whereby Glacier General would repurchase the cheap stock purchased by the Sitomer firm should there be no successful public offering.

Existence of this Glacier General compensation arrangement came to the attention of the commission's staff through the cooperation of Glacier's president, counsel for the underwriter of the proposed Glacier offering, and Stuart C. Goldberg, an attorney formerly associated with the Sitomer firm, it was said.

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New York University Law Review

LITIGATING A SOVEREIGN IMMUNITY CLAIM—THE *HAITI* CASE

Andreas F. Lowenfeld

THE SEC'S RELUCTANT POLICE FORCE: A NEW ROLE FOR LAWYERS

Frederick D. Lipman

Illegitimacy and Equal Protection

Overbreadth Review and the Burger Court

The Liability of Outside Directors Under Rule 10b-5

Book Review: *John Phillip Reid*

VOLUME 49 OCTOBER 1974 NUMBER 4

* The author is aware of at least one instance in which a partner of a law firm apparently gained immunity from an SEC enforcement action by outracing both his partners and his client to the Commission. Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3148 (U.S. Sept. 18, 1974) (No. 74-292), SEC v. Sitomer, Sitomer & Porges, No. 73 Civ. 4308, [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,184 (S.D.N.Y., filed Oct. 19, 1973). The author's firm has represented certain of the partners named in the *Sitomer* case. The ethical dilemma confronting a securities attorney in this situation has been described in Goldberg, *Ethical Dilemmas: Attorney-Client Privilege vs. the National Student Marketing Doctrine*, 1 SEC. REG. L.J. 297, 306-08 (1974).

[111] *See* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3148 (U.S. Sept. 18, 1974) (No. 74-292); SEC v. Sitomer, Sitomer & Porges, No. 73 Civ. 4508, [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,184 (S.D.N.Y., filed Oct. 19, 1973).

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[117] Canon 4 of the Code provides that "[a] lawyer should preserve the confidences and secrets of a client."

The situation hypothesized here does not come within the ambit of DR 4-101(C)(4) which permits a lawyer to reveal "[c]onfidences or secrets necessary . . . to defend himself . . . against an accusation of wrongful conduct." *See* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194-95 (2d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3148 (U.S. Sept. 18, 1974) (No. 74-292). Instead, the attorney subject to aider and abettor liability would be immunizing himself only from possible future prosecution by cooperating with the SEC. This exception to the principle of lawyer-client confidentiality should be interpreted as allowing disclosure only when an attorney is defending himself on the merits against an accusation already made.

It should be noted, however, that even under this limited construction of DR 4-101 an adverse party may strip a defendant of his attorney-client privilege by the simple device of naming the defendant's lawyer as a codefendant. *See* Petition for Certiorari at 11, Meyerhofer v. Empire Fire & Marine Ins. Co., *supra*, *summarized in* 273 BNA SEC. REG. & L. REP. A-8, A-9 (1974).

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Ex. SCG 34 for I.D.

"...The legal profession may be entitled to its peculiar internal ethic but it's not entitled to impose it on the polity..."

St. Clair's one-man show after a distinguished and highly profitable career in the relative anonymity of paneled Boston—his zealous insistence, for instance, that there is no real difference between White House and Judiciary Committee transcripts of Watergate cover-up conversations—painfully demonstrates the dangers of substituting legal ethics for public morality. This *is* a government of laws; St. Clair would make it a government of lawyers.

Not that The Silver Fox is the problem—he is a symptom. Part of the problem is the passivity of Congress, which, it seems to me, is increasingly and sadly inclined to turn government over to the courts and barristers. The Capitol Hill stall, while waiting for the Supreme Court to take the heat on impeachment, is just the latest example of the enthusiastic willingness of Congress to avoid any responsibility that might make any voter unhappy anywhere. Another part of the problem is the natural tendency of the legal fraternity to expand its control of the public process - one congressman last year passed the bar exam at the age of 48 because he felt that he was being systematically excluded from government and politics because he lacked an essential credential, an LL.B.

Thomas Rees, a California Democrat who has served twenty years in the House of Representatives and the state legislature, said he was just sick and tired of being pushed around by lawyers for no other reason than that they were lawyers and he wasn't. "They are instant experts on everything," he said. "It got so bad in the Muskie campaign in '72 that they would keep me out of meetings because 'only a lawyer would understand.' Now I keep my bar association card in my wallet, and when they start that, I pull it out and say, 'I have one, too!' "

Having the card has always meant a great deal around here. In the 1830's, Alexis de Tocqueville noted: "In America, there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar."

Lawyers, of course, do have a common tie—they seem to have everything but a secret handshake, and maybe that's a secret from me—shared experience, interests, and heritage. As worthy as much of that heritage is, it still deserves some scrutiny from time to time—like now—when it is superimposed on the heritage and interests of the rest of us.

Oliver Wendell Holmes was a giant, perhaps the giant, of the American legal heritage, and he labored an intellectual lifetime to separate and distinguish between law and morals—even if that distinction, in his words, "stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. . . .

"If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience," Holmes wrote.

". . . For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether."

A society without moral references does stink in my nostrils—the legal profession may be entitled to its peculiar internal ethic, but it's not entitled to impose it on the polity. There does come a time when the question is "Is it right or wrong?" not "Can it be proved illegal?" And that is why impeachment, constitutionally, is a political question—to be answered in Congress, not the courts—and why James St. Clair's arguments often twitch my nostrils.*

James St. Clair was recommended to Richard Nixon by Charles Colson, a Massachusetts product who knew of St. Clair's work in Boston and approached the lawyer to represent him in his own Watergate troubles.

(It may be significant that this White House had to reach outside, almost desperately, for legal talent. The Nixon administration, with its reliance on the "zero defects" thinking of manager-systems analysis types, represented something of a challenge to the legal profession's intellectual control of American public processes. Watergate may have changed or delayed a titanic struggle for public control between two disciplines which present themselves as hard and objective and tend toward spiritual barrenness - the Law versus the Economics-Systems-Managerial axis.)

Last Christmas, St. Clair was just a wealthy 53-year-old lawyer on his way to a Florida vacation. He was the senior trial partner—earning between $200,000 and $400,000 a year, depending on whom you believe—at Hale & Dorr, an old State Street firm as prestigious as it sounds. His mentor and predecessor in that job was Joseph N. Welch, the gentle, steely wit who had demolished Joseph McCarthy in the televised 1954 Army-McCarthy hearings—where 33-year-old Jim St. Clair was Welch's principal assistant.

A native of Akron, Ohio, a graduate of the University of Illinois and Harvard Law School, and a Navy lieutenant who fought World War II in San Pedro, California, St. Clair was known around Boston as successful, very, very competent, quietly Republican, and an eleven-handicap golfer. He specialized in big-money civil suits and occasional criminal cases, defending bank presidents charged with embezzlement and businessmen accused of tax fraud, and occasionally handled well-publicized public cases, acting as a special prosecutor for Governor John Volpe and defending the Boston School Committee against charges that it violated state racial imbalance laws.

"I never had a hint of what he actually believed about the law or the dispute," said a lawyer who worked with St. Clair in the school segregation case. It's a comment that's often heard about the man. Yale Chaplain William Sloane Coffin Jr., whom St. Clair defended in 1968 against charges of encouraging draft resistance during the Vietnam war, was more pointed: "The trouble with St. Clair is that he is all case and no cause."

His biggest case began last Decem-

**The question of "right or wrong" versus legal ethics has been raised in two recent cases—one widely publicized, the other not. In the celebrated case, two Syracuse, New York, attorneys remained silent for nine months about four murders a client had told them he committed—and the lawyers were widely praised within the profession for adhering to the Code of Professional Responsibility. In the other case, a young New York securities lawyer named Stuart Charles Goldberg was acquitted on appeal by the Second Circuit Court of Appeals after a Federal District Court ruled that he had violated the code by reporting client fraud to the Securities and Exchange Commission. The issue was decided on narrow grounds and all records were immediately sealed, preventing public or lay scrutiny of the internal workings of the legal profession.*

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Ex. SCG 35 for I.D.

School Financing In New Jersey Faces Revision

Justices Let Stand Ruling That Property Tax System Breaks State Constitution

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON — The Supreme Court left standing a state court decision rejecting New Jersey's system of using local property taxes to finance public education.

In early April, the New Jersey Supreme Court held that the existing system short-changes schools in low-income school districts, violating the state's constitution, which requires equal educational opportunities.

Two weeks earlier, the U.S. Supreme Court had ruled such disparities between rich and poor school districts didn't violat the U.S. Constitution, but its action didn't bar lower court decisions based solely on state constitutions.

In other actions yesterday, the high court:

—Refused to review a lower court decision that Continental Baking Co. violated the Robinson-Patman Act through discriminatory bread pricing practices in the Denver area in the mid-1960s. The court awarded judgments and attorneys fees totaling more than $3 million to Old Homestead Bread Co. and Interstate Brands Corp., two wholesale bread bakers that competed with Continental Baking in Denver. Continental is currently a subsidiary of International Tel-

New York Law Firm, Omaha Insurer Accused By SEC of Violating Fraud and Filing Rules

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON — The Securities and Exchange Commission charged the New York law firm of Sitomer, Sitomer & Porges and Empire Fire & Marine Insurance Co., Omaha, with violating the antifraud and registration provisions of securities laws.

In one of the few cases, the SEC has brought involving law firms, a complaint filed in a federal court in New York and released here charges that the Sitomer firm and its three principals, Alvin Sitomer, Stephen Sitomer and Robert Porges, instituted a scheme to obtain "undisclosed payments" in connection with public offerings of stock in companies.

The SEC suit says the agreements typically provided that if the Sitomer firm was successful in assuring a public offering of a company's stock, the concern would pay the firm a cash fee of about 2½% of the gross offering price and would allow it to purchase about 2% of the company's outstanding stock at cheap, pre-public prices. In addition, the firm was paid the customary legal fees, according to the complaint.

The SEC complaint also charges that the Sitomer firm and its three principals, as well as Empire Fire & Marine and its president, Gary O. Gross, and executive vice president, Yale Kaplan, failed to disclose to investors, to underwriters and to its auditors the facts about such a compensation agreement.

The SEC says the defendants in a registration satement and prospectus filed with the agency in 1972 made false statements about the cost of the offering, the use of proceeds and the amount of fees paid to the Sitomer firm, including failing to disclose that Empire was to pay finders fees to the law firm in the form of cash and cheap stock.

The SEC suit also alleges that the principal of the Sitomer law firm last year caused the filing of a registration statement for Glacier General Assurance Co., of Missoula, Mont., which didn't disclose a similar compensation agreement. The SEC said the Glacier General compensation arrangement came to its attention from Glacier's president, the attorney for the underwriter involved and a former lawyer for the Sitomer firm.

The SEC said Empire Fire & Marine's insurance operations and practices aren't involved in the case.

Spokesmen for Sitomer weren't immediately available for comment on the SEC charges.

In Omaha, Empire Fire's president issued a statement in which he said the Sitomer firm was responsible for the alleged wrongdoing. When Empire Fire learned in April of the firm's failure to disclose its compensation agreement, Mr. Gross continued, it was fired as counsel.

At that time, the Empire Fire president "paid to the company approximately $200,000 representing the legal fees not disclosed in the prospectus," his statement noted, "since recovery of this amount from the company's former counsel was uncertain." Empire Fire hopes to bring about "an equitable disposition" of the SEC suit "in the near future," Mr. Gross added.

35

Ex. SCG 35 for I.D.

1126 409a

Ex. SCG 36 for I.D.

NEW YORK LAW JOURNAL—Monday, September 10, 1973

10 Appointed To the Faculty Of N.Y. Law

4 Full-Time, 6 Adjunct Professors Are Named; Curriculum Expanded

New York Law School has named ten new members to its faculty as part of a program to expand its course offerings. Four members will teach full time, six as adjunct professors.

Dean E. Donald Shapiro said the additions would enable the school to offer a greater number of courses in a wide variety of areas in recognition of the changing nature of legal practice and the trend toward specialization.

The full-time professors are:

- Assistant Professor Stephen Hochberg, former general counsel to the Lefrak Organization and former law clerk to the late Judge Abraham L. Freedman of the Third U. S. Circuit Court of Appeals in Philadelphia. He will teach Land Uses and Property. He is an alumnus of Yale Law School where he was a note editor of the law review.

- Assistant Professor Suzanne Solomon, a former assistant district attorney in Manhattan of New York County. She will teach sex-based discrimination and constitutional law. She is a graduate of Rutgers Law School where she was a law review editor.

- Assistant Professor Salvatore M. Pino, former chief of the indictment Bureau in the New York County District Attorney's office. He will teach New York practice. He is a graduate of the Fordham University Law School where he was on the board of editors of the law review.

- Margaret S. Bearn, who will be assistant dean and an assistant professor. She has been in private practice and most recently was dean of the Laboratory Institute of Merchandising.

The adjunct professors will be:

- Arthur M. Borden, senior partner in the firm of Borden & Ball, who will teach securities regulation. He is a graduate of Columbia Law School, a columnist and has frequently written and lectured on securities law.

- Myron Cohen, partner in Hubbell, Cohen & Stiefel, who will teach patent law. He holds a Bachelor of Engineering degree from Cornell University and is a graduate of Columbia Law School.

- Judianne Densen-Gerber, founder and executive director of Odyssey House. She is a graduate of New York University Medical School and holds LL. B. and Doctor of Jurisprudence degrees from Columbia Law School. She will teach "The Lawyer in the Urban Crisis."

- Benjamin Melniker, a former general counsel and executive vice-president of Metro-Goldwyn-Mayer. He is a graduate of Fordham Law School and will teach copyright (literary property) law.

- Martin A. Schwartz, staff attorney of Legal Aid of Westchester, who will teach poverty law. He is a graduate of Brooklyn Law School and holds a Masters Degree from New York University School of Law.

- Robert S. Taft, partner in Hatfield, Brady & Taft. A graduate of Columbia Law School and frequent lecturer and author, he will teach estate planning.

Ex. SCG 36 for I.D.

EX. SCG 37 for I.D.

54 East 8th Street,
New York, N.Y. 10003

December 12, 1974

Dear Professor Goldberg:

In late November, when I returned from an interview, I discussed what had been said to me with Dean Bearn and she suggested that I tell you.

Accordingly, as I told you yesterday in your office, while I was being interviewed by Carter, Ledyard & Milburn, I was shown in to see Mr. Riggs (I am not entirely positive that it was Mr. Riggs, but I believe it was). He asked me "Isn't New York Law School the school where they have that man Goldberg?" I didn't quite understand, and said "You mean, Professor Stuart Goldberg?" He replied "Yes, that unsavoury fellow, the one involved in that litigation." I was surprised at his tone of voice and said "But, wasn't he fully exonerated of any wrongdoing?" As far as I remember, Mr. Riggs then said something to the effect, that "Well, we don't think so. Once someone was involved in a thing like that . . . "

I inferred from the whole conversation two things: one was disapprobation by Mr. Riggs of the school for having such a professor, and, secondly, disapprobation by Mr. Riggs of you personally.

Sincerely yours,

Stacy Olliphant

Stacy Olliphant

SO:hof

37
Ex. SCG for I.D.

411/a 1128

Ex. SCG 37-A for I.D.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

LITIGATION RELEASE

SEC v. SITOMER, SITOMER & PORGES, ET AL.
(United States District Court for the Southern District of New York)

On October 19, 1973 the Securities and Exchange Commission filed a complaint in the United States District Court for the Southern District of New York seeking to enjoin the law firm of Sitomer, Sitomer and Porges, Alvin Lester Sitomer, Stephen Joel Sitomer, Robert E. Porges, Empire Fire and Marine Insurance Co., Gary O. Gross and Yale Kaplan from further violations of Sections 5(b), 7, and 17(a) of the Securities Act of 1933 and Rules 408 and 463 thereunder and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The Commission's complaint alleges that the Sitomer law firm and the three principals of the firm, Alvin Sitomer, Stephen Sitomer and Robert Porges instituted a scheme whereby they would solicit the officers of private companies to enter into written compensation agreements with the Sitomer law firm. These agreements typically provided that if the Sitomer firm was successful in assuring that there was a public offering of the stock of these companies, then the companies would pay to the Sitomer firm a cash fee of approximately 2 1/2% and would allow the Sitomer firm to purchase approximately 2% of the company's outstanding stock at cheap pre-public offering prices. In addition these agreements provided that the Sitomer firm be paid customary fees for legal work done.

The Commission's complaint further alleged that the Sitomer firm, Alvin Sitomer, Stephen Sitomer, Robert Porges, Empire Fire and Marine Insurance Co., Empire's president Gary O. Gross, and Empire's executive vice-president, Yale Kaplan, failed to disclose to the public, to underwriters and to its auditors the material facts surrounding the compensation agreement between Empire Fire and Marine and the Sitomer firm. The Commission alleged that these defendants in a registration statement and prospectus filed with the Commission and dated May 31, 1972 made untrue statements regarding the cost of the offering, the use of proceeds and the amount of fees paid to the Sitomer firm and also failed to disclose the fact that Empire was to pay finders fees to the Sitomer firm in the form of cash and cheap stock.

The complaint also alleges that the principals of the Sitomer law firm caused a registration statement for Glacier General Assurance Company to be filed with the Commission which failed to disclose, among other things, that Glacier General was to pay the Sitomer firm a cash finders fee of 2% of the gross offering price or $400,000; and, that the profit of approximately $900,000 on the cheap Glacier stock transferred to the Sitomer firm might be considered further finders fees, in light of an agreement whereby Glacier General would repurchase the cheap stock purchased by the Sitomer firm should there be no successful public offering.

Existence of this Glacier General compensation arrangement came to the attention of the Commission's staff through the cooperation of Glacier's president, counsel for the underwriter of the proposed Glacier offering and Stuart C. Goldberg, an attorney formerly associated with the Sitomer firm.

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Ex. SCG 41 for I.D.

STUART CHARLES GOLDBERG, ESQ.
PROFESSIONAL ACCOUNT

THE CHASE MANHATTAN BANK
National Association
1 Lincoln Plaza, New York, N. Y. 10023

144- 263

1/21 1973 1-2/210

PAY TO THE ORDER OF Burton H. Finkelstein — $1,500 00/100

One thousand five hundred — DOLLARS

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

Stuart Goldberg

⑆0210⑈0002⑆ 230⑈1⑈011306⑈ ⑈0000150000⑈

STUART CHARLES GOLDBERG, ESQ.
PROFESSIONAL ACCOUNT

THE CHASE MANHATTAN BANK
National Association
1 Lincoln Plaza, New York, N. Y. 10023

144- 265

1/25 1973 1-2/210

PAY TO THE ORDER OF Burton Finkelstein Esq. $1,000 00/100

One thousand and 00/100 DOLLARS

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

THE CHASE MANHATTAN BANK, N.A. 1/25/73 PAYABLE

DO NOT DESTROY

Stuart Goldberg

⑆0210⑈0002⑆ 230⑈1⑈01130 ⑈0000100000⑈

414a

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STUART CHARLES GOLDBERG, ESQ.
PROFESSIONAL ACCOUNT

THE CHASE MANHATTAN BANK
National Association
1 Lincoln Plaza, New York, N. Y. 10023

144- 384

7/19 1973 1-2/210

PAY TO THE ORDER OF Phillips Nizer Krim & Ballon — $1,465 00/100

One thousand four hundred and sixty five DOLLARS

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

Legal services of Barton H. Finkelstein re SEC investigation: 61 hours at $65 per hr $3,965 less $2,500 paid on a/c

Stuart Goldberg

⑆0210⑈0002⑆ 230⑈1⑈011306⑈ ⑈0000146500⑈

STUART CHARLES GOLDBERG, ESQ.
PROFESSIONAL ACCOUNT

THE CHASE MANHATTAN BANK
National Association
1 Lincoln Plaza, New York, N. Y. 10023

144614

10/14 1974 50-157/213 16

PAY TO THE ORDER OF Wormser, Kiely, Alessandroni & McCann $2,491 10/00

Two thousand four hundred ninety one and 10/00 DOLLARS

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

AUTH. SIG.

Stuart Goldberg

⑆0210⑈0002⑆ 230⑈1⑈011306⑈ ⑈0000249110⑈

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Ex. SCG 42 for I.D.

STUART CHARLES GOLDBERG, ESQ.
PROFESSIONAL ACCOUNT

THE CHASE MANHATTAN BANK
National Association
1 Lincoln Plaza, New York, N. Y. 10023

144629

11/10 19 74 50-157/213 16

PAY TO THE ORDER OF Bar Press $ 216 54/100

two hundred sixteen and 54/100 DOLLARS

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

re	Empire Fire v Meyerhoffer		
your #	3538		

AUTH. SIG.

⑆0210⑉0002⑆ 230⑉1⑉011306⑈ ⑈0000021654⑈

TELEPHONE WO 6-3906

Bar Press, INC.

132 LAFAYETTE STREET, NEW YORK, N. Y. 10013

October 28, 1974

Terms: Cash

To:

Wormser, Kiely, Alessandroni & McCann, Esqs.
100 Park Avenue
New York, N.Y. 10017

ATT: Lawrence M. McKenna, Esq.

When making payment please indicate our Job No. 3538

Empire Fire and Marine Ins. Co. v. Meyerhofer

60 Copies Brief		$200.50
	Sales Tax	16.04
		$216.54

144629
11/10/74
$ 216.54

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------------X

HFRBERT FEDERMAN, et ano., :

Plaintiffs, :

-against- :

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al., : 73 Civil 1940 (L.F.M.)

Defendants, :

-and- :

STUART C. GOLDBERG and JACOB ASCHKENASY, :

Additional Defendants on Cross-Claims. :

--------------------------------------X

NOTICE OF MOTION MADE BY THE ADDITIONAL DEFENDANT, ASCHKENASY FOR JUDGMENT ON THE PLEADINGS UNDER RULE 12(c), FEDERAL RULES OF CIVIL PROCEDURE

SIRS:

The undersigned attorneys for the additional defendant, Jacob Aschkenasy, will move this Court for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure; such motion is hereby ma[illegible] returnable in Court Room 2704, at the Federal Courthouse, Foley Square, New York, New York on MARCH 19th, 1976 at 2:15 P.M.

Answering papers are to be served on the undersigned at least three (3) days prior to said return date.

Dated: New York, N. Y.
March 9th, 1976

[signature]
A Member of the Firm of
DAVIS & DAVIS
Attorneys for Additional
Defendant, Aschkenasy
116 John Street
New York, N. Y. 10038
962-1111

TO:

Clerk of U. S. District Court
Southern District of New York

Thal & Youtt
Attorneys for Defendant
Stuart C. Goldberg as
Cross-Complainant
919 Third Avenue
New York, N. Y. 10022
962-8020

Hart & Hume, Esqs.
Co-Counsel for Additional Defendant
and Cross-Claimant, Goldberg
10 East 40th Street
New York, N. Y. 10017
686-0920

Wormser, Kiely, Alessandroni,
Mahoney & McCann, Esqs.
Co-Counsel for said Additional
Defendant, Goldberg
100 Park Avenue
New York, N. Y. 10017
889-8480

D'Amato, Costello & Shea, Esqs.
Attorneys for Defendants, Sitomer
and related defendants
116 John Street
New York, N. Y. 10038
791-1500

Aschkenasy Notice of Motion for Judgment on the Pleadings

Aranow, Brodsky, Bohlinger, Benetar
& Einhorn, Esqs.
Attorneys for Defendants, Empire and
related defendants
469 Fifth Avenue
New York, N. Y. 10038
889-1470

Affidavit of Robert E. Meshel, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

HERBERT FEDERMAN, et ano.,

Plaintiffs,

-against- 73 Civ. 4516 (LFM)

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants.

-and-

STUART C. GOLDBERG AND JACOB ASCHKENASY,

Additional Defendants of Cross-Claims,

---X

DIETRICH MEYERHOFER and HERBERT FEDERMAN, etc.,

Plaintiffs,

-against- 73 Civ. 1940 (LFM)

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants.

---X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT E. MESHEL, being duly sworn, deposes and says:

1. I am a member of the firm of D'Amato, Costello & Shea, attorneys for the Defendants-Alvin L. Sitomer, Stephen J. Sitomer, Robert E. Porges, and the firm of Sitomer, Sitomer & Porges, (hereinafter referred to collectively as "Sitomer") and as such, I am fully familiar with all the pleadings and proceedings heretofore had herein.

Affidavit of Robert E. Meshel, Esq.

2. The Sitomer Defendants are also moving for a dismissal of the claims over asserted by the co-Defendant Stuart Goldberg for the same reasons in factual basis as set forth in the moving pleadings of co-Defendants-Jacob Aschkenasy ("Aschkenasy") and Empire Fire and Marine Insurance Company ("Empire"). If this Court grants summary dismissal of Goldberg's claims over against Aschkenasy and Empire as asserted, the same grants are equally applicable to the Sitomer Defendants. The Sitomer Defendants incorporate by reference the affidavits and legal authority cited by the moving co-Defendants Aschkenasy and Empire.

Sworn to before me this
5th day of March, 1976

Robert E. Meshel

Endorsement, December 3, 1976.

Federman v. Empire Fire & Marine Ins. Co. et al.

ENDORSEMENT
73 Civ. 1940 (LFM)

In considering the within motion, we exclude and do not consider any matters outside the face of the amended answer of additional defendant Goldberg, for, if anything is clear in this confused litigation, it is that the case is not ripe for summary judgment or judgment on the pleadings. We, therefore, treat the within motion as one under Rule 12(b)(6), Fed.R.Civ.P., to dismiss the counterclaim and cross-claim alleged in paragraphs 41 through 44 and 45 through 48 of the amended answer for failure to state a claim upon which relief can be granted.

Addressing not the argumentative statements and conclusions in the affidavits, memoranda and other matter presented but the face of the amended answer, we find that it fails to allege either any intentional or negligent act, omission or conduct on the part of the defendants named in either the counterclaim or cross-claim which inflicted causally-connected injuries upon Goldberg. Absent such an allegation, additional defendant Goldberg's reliance on the cases involving non-conventional torts is misplaced. If Goldberg has a claim for non-conventional tort, he ought to be able to state it so that the parties and the court know what it is.

Accordingly, the above-described counterclaim and cross-claim are dismissed, with leave to serve and file a further amended answer pleading such claims, if any, within twenty (20) days.

So ordered.

Dated: New York, N.Y.
December 3, 1976

DEC 7 1976

LLOYD F. MacMAHON
United States District Judge

MICROFILM
DEC 0 - 1976

Empire Notice of Motion to Dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERBERT FEDERMAN and DIETRICH MEYERHOFER,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants,

-and-

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims.

---

73 Civ. 1940 (L.F.M.)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the undersigned will move this Court, at the United States Court House, Foley Square, New York, New York, Room 307, on January 14, 1977, at 2:15 P.M., for an order dismissing the first and second counterclaims asserted against them in the "Amendment to Amended Answer of Additional Defendant Stuart Charles Goldberg" on the ground that each of those counterclaims fails to state a claim upon which relief can be granted, together with such other relief as the Court may deem proper.

PLEASE TAKE FURTHER NOTICE that opposing papers are required to be served at least three (3) days prior to

the return date of this motion.

Dated: New York, New York
January 4, 1977

Yours, etc.,

ARANOW, BRODSKY, BOHLINGER,
BENETAR & EINHORN

By Anthony L. Tersigni
(A Member of the Firm)
Attorneys for Defendants Empire
Fire and Marine Insurance
Company, Gary O. Gross and
Yale J. Kaplan
469 Fifth Avenue
New York, New York 10017
Tel. No. (212) 889-1470

TO: THAL & YOUTT, ESQS.
Attorneys for Additional Defendant
Stuart Charles Goldberg
919 Third Avenue
New York, N.Y. 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

HERBERT FEDERMAN and DIETRICH MEYERHOFER,

Plaintiffs,

-against-

73 Civ. 1940
(L.F.M.)

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

NOTICE OF MOTION

Defendants,

-and-

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims.

---x

Motion by Additional Defendant, Jacob Aschkenasy, under Rule 8(a)(2); Rule 8(e)(1); Rule 12(b)(6) and Rule 12(f) FRCP.

S I R S :

PLEASE TAKE NOTICE that, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the additional defendant, Jacob Aschkenasy, will move this Court, at the United States Court House, Foley Square, New York, New York, Room 307, on January 14, 1977, at 2:15 P.M., for an order under Rule 12(g)(6) FRCP dismissing the first cross-claim and the second cross-claim and counterclaim asserted against him in the "Amendment to Amended Answer of Additional Defendant Stuart Charles Goldberg" on the ground that each of those cross-claims and the counterclaim fails to state a claim upon

which relief can be granted; and

Alternatively, if the aforesaid motion should not be granted, said additional defendant, Aschkenasy, moves for the following relief:

1. Under Rule 8(a)(2) and Rule 8(e)(1), to strike the entire "Amendment to Amended Answer of Additional Defendant Goldberg", on the grounds (1) that it is not a short and plain statement of his alleged claim, (2) the averments thereof are not simple, concise and direct, and (3) the answering pleading thereto, on the part of additional defendant, Aschkenasy, would be difficult and arduous because of the prolixity, argumentativeness and self-serving nature of the said "Amendment";

2. Under Rule 12(f) to strike the said "Amendment to Amended Answer" because it is impertinent, in that the pleader refers to himself 67 times as "Professor Goldberg" as a device to attempt to aggrandize himself before a court or jury; and

3. For such other relief as the Court may deem proper.

PLEASE TAKE FURTHER NOTICE that opposing papers are required to be served at least three (3) days prior to the return date of this motion.

Dated: New York, New York
January 4, 1977.

Yours, etc.

DAVIS & DAVIS

By: Harold Davis
(A Member of the Firm)
Attorneys for Additional
Defendant Aschkenasy
116 John Street
New York, N.Y. 10038
Tel: (212)962-1111

TO: THAL & YOUTT
Attorneys for Additional Defendant
Goldberg
919 Third Avenue
New York, N.Y. 10022

ARANOW, BRODSKY, BOHLINGER,
BENETAR & EINHORN
Attorneys for Defendants
Empire Fire and Marine Insurance
Company, Gross and Kaplan
469 Fifth Avenue
New York, N. Y. 10017

D'Amato, Costello & Shea
Attorneys for defendants Sitomer, etc.
116 John Street
New York, N. Y. 10038

Hart & Hume
Attorneys for cross-claimant and
third-party defendant, Goldberg
10 East 40th Street
New York, N.Y. 10016

Law Firm Defendants Notice of Motion to Dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

STUART C. GOLDBERG,

Plaintiff and
Additional Defendant,

73 Civ. 1940 (LFM)

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et. al.,

Defendants,

NOTICE OF MOTION

---X

S I R S :

PLEASE TAKE NOTICE that, pursuant to Rules 8(a)(2), 8(e)(1), 12(b)(6), et. seq. of the Federal Rules of Civil Procedure, the Defendants-Steven Sitomer, Alvin Sitomer, Robert Porges and Sitomer, Sitomer & Porges will move this Court, at the United States Court House, Foley Square, New York, New York, Room 307 on January 14, 1977, at 2:15 P.M. for orders: (A) Dismissing the "Cross-Claims" designated as "FIRST," "SECOND," "THIRD" and "FOURTH" asserted in the "Amendment to Amended Answer of Additional Defendant Stuart Charles Goldberg" on the ground that said "Cross-Claims" fail, as a matter of law, to state a claim upon which relief can be granted, and (B) Striking the entire "Amendment to Amended Answer of Additional Defendant Goldberg" on the grounds (1) that it is not a short and plain statement of his alleged claim, (2) the averments thereof are not simple, concise and direct, and (3) the answering pleading thereto, on the part of the Defendants would be arduous because of the nature of the said "Amendment"; and (C) Granting such other, further and different relief as the Court may deem proper.

PLEASE TAKE FURTHER NOTICE that opposing papers are required to be served at least three (3) days prior to the return date of this motion.

Dated: New York, New York
January 5, 1977

Yours, etc.,

D'AMATO, COSTELLO & SHEA
Attorneys for Defendants-
Steven Sitomer, Alvin Sitomer, Robert Porges and Sitomer, Sitomer & Porges

By: ______________________
ROBERT E. MESHEL
(A Member of the Firm)
Office & P. O. Address
116 John Street
New York, New York 10038
Tele. (212) 791-1515

TO:

THAL & YOUTT, ESQS.
919 Third Avenue
New York, New York 10022
Attorneys for Additional
Defendant Stuart C. Goldberg

ARANOW, BRODSKY, BOHLINGER,
BENETAR & EINHORN
469 Fifth Avenue
New York, New York 10017
Attorneys for Defendants Empire Fire and Marine Insurance Co., Gary O. Gross and Yale J. Kaplan

DAVIS & DAVIS, ESQS.
116 John Street
New York, New York 10038
Attorneys for Defendant-
Jacob Aschkenasy